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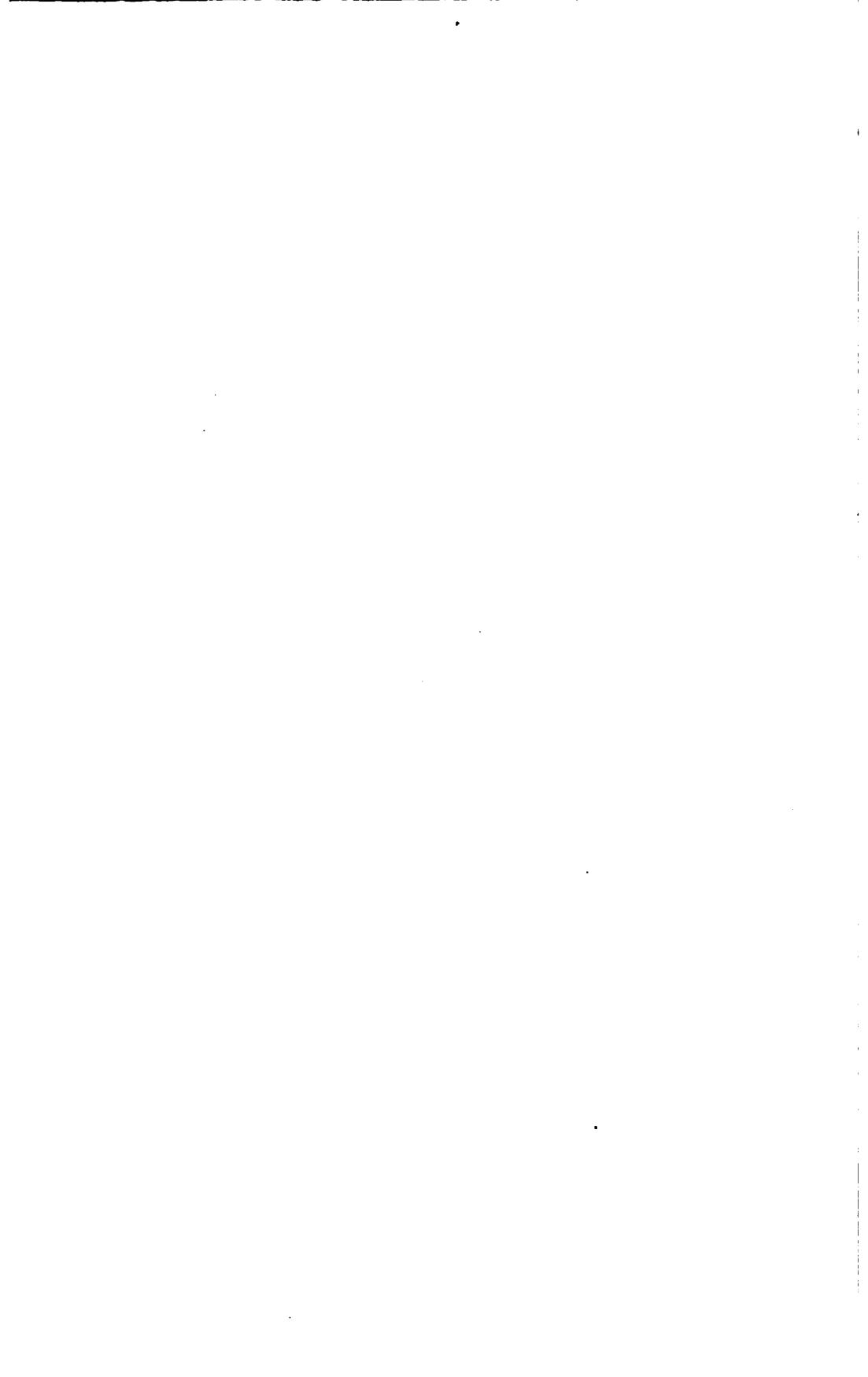
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CASES

ON

DOMESTIC RELATIONS

LEADING AND SELECT CASES

ON

THE DISABILITIES INCIDENT TO INFANCY AND COVERTURE

BY

MARSHALL D. EWELL, M.D., LL.D.

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STUDENTS' EDITION

REARRANGED WITH OMISSION OF NOTES AND WITH ADDITIONAL CASES ON MARRIAGE, HUSBAND AND WIFE, COVERTURE, DIVORCE, INFANCY, AND PARENT AND CHILD

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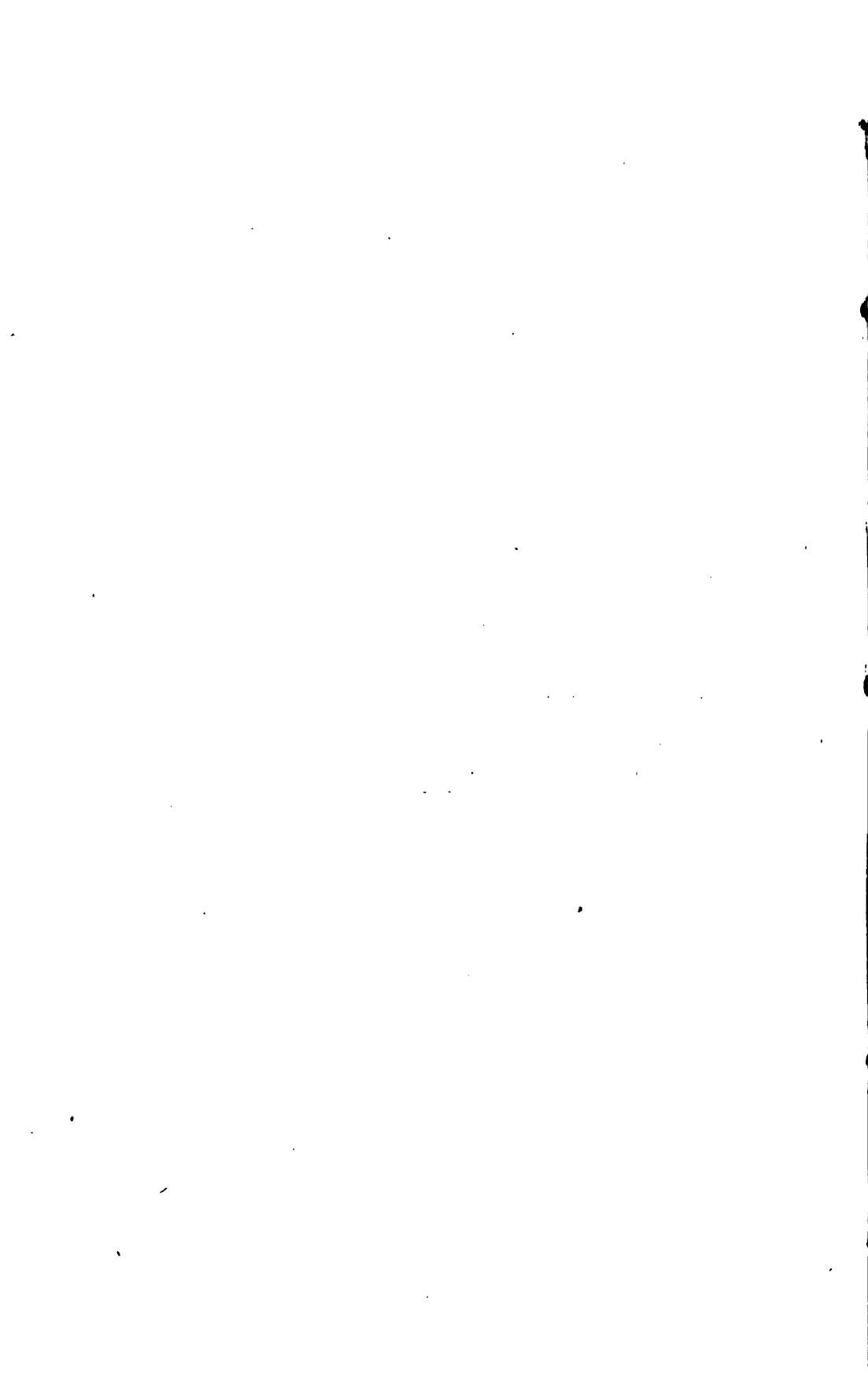


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CASES ON DOMESTIC RELATIONS.

INFANCY.

HERBERT v. TURBALL.1

(1 Keble, 589; s. c. Siderf. 162, pl. 17; Raym. T. 84. Court of King's Bench, 1663.)

When an Infant arrives at Majority.

An infant makes a will under the age of twenty-one years, and when of age dyeth without publication, it's void; but per curiam, if after age he new publisheth it, it's good. So if the publication were (as in the case at bar), on the same day that he came of age, which was the day also of his death; also, by Keeling and Hyde, and not denied, that H., born the 16th of February, 1608, is, the 15th of February (1629), twenty-one years after, of full age, and whatever hour he were born is not material, there being no fraction of days. Also by Twysden, Will made on the day that H. cometh on age, is good, which was agreed also in evidence to a jury at bar.

THE STATE v. CLARKE.

(3 Harring. 557. Court of General Sessions and Oyer and Terminer of Delaware.)

When an Infant arrives at Majority.

Kent, October Term, 1840.

The defendant was presented by the grand jury for illegal voting at the late inspector's election.

The presentment set forth these facts, to wit: That the defendant was born on the 7th of October, A. D. 1819, and voted at the

'The name of the defendant in variously called "Turball," "Torthe different reports of this case is ball," and "Tuckal."

election held on the 6th of October, 1840, upon age. In his behalf a motion was now made to quash the presentment on the ground that it appeared from the face of it that the defendant was of full age at the time he voted, and was, therefore, not guilty.

It was proved that he stated the facts to the judges of the election, a majority of whom decided that he had a right to vote.

Mr. Clayton, for the defendant, cited 1 Black. Com. 497. . . .

By the Court. BAYARD, Chief Justice. Many persons suppose that the expression in the constitution relative to the qualifications of voters is, that citizens between the ages of twenty-one and twenty-two years shall be entitled to vote without paying tax; and on this the common but erroneous notion is, that a man must be in point of fact actually within his twenty-second year before The premises and conclusion are both wrong. he can vote. "Every free white male citizen of the age of twenty-one years, and under the age of twenty-two years, having resided as aforesaid, shall be entitled to vote without payment of any tax." (Const. Art. 4, sec. 1.) To ascertain when a man is legally "of the age of twenty-one years," we must have reference to the common law, and those legal decisions which from time immemorial have settled this matter, in reference to all the important affairs of life.

When can a person make a valid will; when can he execute a deed for land; when make any contract or do any act which a man may do, and an infant, that is, a person under the age of twenty-one years, cannot do? On this question the law is well settled; it admits of no doubt. A person is "of the age of twenty-one years" the day before the twenty-first anniversary of his birthday.

It is not necessary that he shall have entered upon his birth-day, or he would be more than twenty-one years old. He is, therefore, of age the day before the anniversary of his birth; and, as the law takes no notice of fractions of a day, he is necessarily of age the whole of the day before his twenty-first birthday; and upon any and every moment of that day may do any act which any man may lawfully do. (1 Chit. Gen. Prac. 766.)

"It is to be observed that a person becomes of age on the first instant of the last day of the twenty-first year next before the anniversary of his birth; thus, if a person were born at any hour of the 1st of January, A. D. 1801 (even a few minutes before twelve

o'clock of the night of that day), he would be of full age at the first instant of the 31st of December, A. D. 1821, although nearly forty-eight hours before he had actually attained the full age of twenty-one, according to years, days, hours, and minutes; because there is not in law in this respect any fraction of a day; and it is the same whether a thing is done upon one moment of the day or another."

On the face then of this presentment, it appears that Mr. Clarke was entitled to vote on the 6th of October, being on that day of the age of twenty-one years: and the presentment, showing no offence, must be quashed.

ZOUCH ex dem. ABBOTT and HALLETT v. PARSONS.

(3 Burr. 1794; s. c. 1 W. Black. 575. Court of King's Bench, 1765.)

What Deeds, &c., of an Infant are binding, and what void or voidable.

This was a special case in ejectment; and the question was, "whether an infant's conveyance by lease and release was absolutely void, or only voidable." The cause had been twice tried. :Upon the first trial an incomplete case had been drawn up and agreed upon, which having been argued on Friday, 17th June, 1763, by Mr. Sergeant Glynn, for the plaintiff, and Mr. Dunning for the defendant, Lord Mansfield then observed, that many circumstances were necessary to be known, besides those contained in the case as it then stood, which was not sufficiently stated to come at the merits; and if the parties could not agree upon the facts, the cause must be tried over again and those facts ascer-It was, therefore, adjourned at that time, in order for the necessary facts and circumstances to be more completely stated; and, the parties not agreeing to them, a second trial became requisite. It was tried this second time at the Lent assizes, 1764, for Somersetshire, before Mr. Justice Yates; when a verdict was found for the plaintiff, subject to the opinion of this Court, upon the following case:—

Special case. John Bicknell, being seised in fee of the messuage and lands in the declaration mentioned by indenture of

lease and release, dated 24th March, 1750; and 25th March, 1751, conveyed the premises to William Cook and his heirs by way of mortgage, for securing the repayment of 280l. William Cook afterwards died, leaving John Lamb Cook, an infant, his eldest son and heir-at-law; and also leaving his widow, Elizabeth Cook, and the said John Lamb Cook his joint executors and residuary legatees.

John Bicknell, the mortgagor, afterwards brought the title-deeds of the premises to one Mr. John Williams, an attorney, and desired him to procure the sum of 400l. upon the same security, in order to pay off the said mortgage to the Cooks, and for other purposes.

Williams applied to the lessors of the plaintiff, who agreed to advance the same; and by indentures of lease and release, bearing date respectively on the 29th and 30th of June, 1761, between the said John Lamb Cook (then being an infant of between sixteen and seventeen years of age) and the said Elizabeth Cook, of the first part; the said John Bicknell of the second part; and the said Henry Abbott and Catharine Hallett (lessors of the plaintiff), of the third part; the said John Lamb Cook and Elizabeth Cook, in consideration of the sum of 280l. in the said release mentioned to be to them paid by the lessors of the plaintiff granted and released, and the said John Bicknell, as well for the consideration aforesaid, as for the further sum of 1201. to him mentioned to be paid by said lessors of the plaintiff, granted, ratified, and confirmed the said premises to the said Abbott and Hallett, and their heirs, to hold to them, their heirs and assigns for ever. The said Mr. Williams, when he drew the last-mentioned mortgage deed, apprehended that the whole principal sum of 280l. continued due to the representatives of the said William Cook, upon his said mortgage, and therefore expressed that sum to be the consideration paid to them; but, in fact, the sum of 1001. only principal money, and 91. for interest, then remained due thereon; the said William Cook having been paid the other 180l. in his lifetime; and accordingly, at the time of the execution of the said last-mentioned indentures of lease and release, Elizabeth Cook received 1091., being the principal and interest then remaining due to her son and her as representatives of her late husband, upon his mortgage; and the residue of the sum of 400l. was received by the said John Bicknell from the lessors of the plain-

The said John Bicknell continued in possession of the premises from the time of his conveyance thereof to the said William Cook, until the year 1756, when he conveyed the premises, by way of mortgage for 200l., to one Thomas Thorne for a term of years, who, in March, 1762, assigned the said term to the defendant, Henry Parsons, in consideration of the sum of 2281. in the said deed of assignment mentioned to be the principal, interest, and costs then due from Bicknell to the said Thorne; but, before the assignment to the defendant, Mr. Williams, then being attorney for the lessors of the plaintiff, gave the defendant notice of the mortgage made to William Cook, and of the assignment of it to the lessors of the plaintiff. On the 27th day of March, 1764, two days before the day of holding the assizes at Taunton, the said John Lamb Cook made an entry on the premises, in order to avoid his said lease and release to the lessors of the plaintiff:

The question is, "whether the lessors of the plaintiff are entitled to recover the premiscs." 1

LORD MANSFIELD, after stating the case minutely, now delivered the resolution of the court, to the following effect:—

The merits of this cause turn upon two general questions: 1. Whether this conveyance is good, and binds the infant; 2. If it does not bind the infant, whether the defendant can take advantage of the infancy, and on that account object to it. As to the first, — miserable must the condition of minors be, excluded from the society and commerce of the world, deprived of necessaries, education, employment, and many advantages, if they could do no binding acts. Great inconvenience must arise to others, if they were bound by no act. The law therefore, at the same time that it protects their imbecility and indiscretion from injury through their own imprudence, enables them to do binding acts, for their own benefit, and, without prejudice to themselves, for the benefit of others. To mention a rule or two, the reasons of which are applicable to the present case: If an infant does a right act which he ought to do, which he was compellable to do, it shall bind him; as if he makes equal partition; if he pays rent; if he admits a copy-holder, upon a surrender. But there is no occasion to enumerate instances; the authorities are express, and the reason decisive. "Generally, whatsoever an infant is bound to do

¹ Arguments of counsel are omitted. — ED.

by law, the same shall bind him, albeit he doth it without suit of law." The second resolution in Conny's case is, "that although the infant in the case at bar was not compellable to attorn, because the manor was not conveyed by fine; yet, because by a mean, he was compellable to attorn, scilicet, if a fine had been levied, the attornment was good." Fortescue lays it down larger, 18 H. VI. fo. 2 a: "He did but that which he ought to do; therefore the attornment is good." "The attornment of an infant to a grant by deed is good, because it is a lawful act; albeit he be not, upon that grant by deed, compellable to attorn." Co. Litt. 315 a. The reason is manifest; a right and lawful act is not within the reason of the privilege, which is given, to protect infants from wrong. His being compellable by any mean, or in any way to do it, proves the act to be substantially what he ought to do.

In the case of Holt v. Ward, the infant's being compellable by the ecclesiastical court, would have answered the objection made there, as much as her being compellable by the common law; therefore civilians were heard. To what end should the law permit a minor to avoid an act which in any way, through any mean, by any jurisdiction, he might be compelled to do over again, after it was undone? it would be assisting him to vex and injure others without the least benefit to himself. Another rule, which may be collected from the books, is, "that the acts of an infant, which do not touch his interest, but take effect from an authority which he is trusted to exercise, are binding;" as where an infant patron presents; an infant executor duly receives and acquits, pays and administers the assets; an infant head of a corporation joins in corporate acts; an infant officer does the duty of an office which he may hold. A third rule, deducible from the nature of the privilege which is given as a shield, and not as a sword, is, "that it never shall be turned into an offensive weapon of fraud or injustice." As where tenant for life and infant in remainder levied a fine, the infant reversed the fine, as to himself, for the inheritance for nonage; yet he shall be bound by his assent to the fine and joining in it, not to enter for the forfeiture; and the fine was held good as to the estate of tenant for life, and reversed guoad the infant only. Pigot v. Russel, 2 Leon. 108, Cro. Eliz. 124, s. c.

To see whether the reasons of these rules are applicable in the present case, it is necessary to ascertain what is in truth the nature of this transaction. Part of the personal estate of William Cook consisted of 1091. due from John Bicknell, secured by a mortgage in fee. His widow and infant son were joint executors and residuary legatees, and, as such, entitled to this money.

The fee which descended to the son was merely as a pledge for the money, besides the money the infant had no beneficial interest in the land whatsoever. Upon payment he was bound to convey as the mortgagor should direct. Conveying is no more than delivering up a security when it is satisfied. The money here was paid to the proper hand. An adult, under the same circumstances, would have been guilty of a breach of trust; if he had refused, he would have been compelled to do it, and would have been condemned in costs for refusing. By act of parliament, 7 Ann. the infant was compellable to do it during his minority. It was much stronger here, that the money was paid by the plaintiffs, who, upon the faith of this conveyance, and the title-deeds produced by Bicknell, the mortgagor, advanced more money. The whole beneficial estate belonged to Bicknell, after paying the 1091. The infant's conveyance was matter of form, and in the nature of an authority, executed by Bicknell's direction, in favor of a third person, who ventured his money upon the faith of it.

It would be iniquitous in the infant to avoid it; it would be unjust to set up the privilege to make an innocent man lose his money, circumvented by his confidence in the infant's concurrence. But it could not even have that effect. It would be nugatory and without any effect. For if it was avoided, he must make the same conveyance over again; he would be compelled to do it. A conveyance to the defendant would be a breach of trust.

By the case stated upon the infant's conveyance was a right act, such as he ought and was compellable to do. The court then ordered a new trial, to get a more correct state of the case.

Upon the second trial it now comes out clear, that the infant was expressly a trustee for the plaintiffs. He was paid by

¹ V. c. 19, § 2.

² See the beginning of this case.

them; upon the faith of the fee being in him, they advanced more money.

If the fee was in a stranger, the plaintiffs have the prior equity.

If Thorne had been prior, his letting the mortgagor have the title-deeds might be sufficient to postpone him. And the defendant had express notice. There can be no doubt that the infant was compellable to do what he has done. Upon the first question we are all of opinion that "this conveyance binds the infant." But supposing it not binding against him, or those who may stand in his place; the second question is, "whether the defendant can take advantage of the infancy, and on that account object to the conveyance." This depends upon two points: 1. "Whether this conveyance be void, or voidable only. 2. If voidable only, whether the infant by his entry before the assizes had absolutely avoided it." It is not settled what is the true ground upon which an infant's deed is voidable only. "Whether the solemnity of the instrument is sufficient," or "it depends upon the semblance of benefit to the infant from the matter of the deed upon the face of it." As to the first, the solemnity of the instrument, we think the law is as laid down by Perkins 1 that "all such gifts, grants, or deeds made by infants which do not take effect by delivery of his hand, are void; but all gifts, grants, or deeds made by infants by matter in deed or in writing, which do take effect by delivery of his hand, are voidable by himself, by his heirs, and by those who have his estate." The words "which do take effect" are an essential part of the definition, and exclude letters of attorney, or deeds which delegate a mere power and convey no interest. In Bro. Abr. title "Dum fuit infra ætatem," pl. 1 (which cites 46 Edw. III. 34), it is noted "that a dum fuit infra ætatem was admitted to lie of a rent; and yet by some the grant of an infant was void and not voidable." But (says the book) "it is not so; for then this action would not lie. And, besides, the delivery of a deed cannot be void, but only voidable." There is no difference in this respect between a feoffment and deeds which convey an interest. The reason is the same. The delivery of the deed must be in the presence of witnesses, as much as the livery of seisin. The ceremony is as solemn. The presumption "that the witnesses would not attest, if they saw him an infant," holds equally as to both. Littleton, who writes with great accuracy and precision, puts them both upon the same foot.

He says, "If before the age of twenty-one, any deed or feoffment, grant, release, confirmation, obligation, or other writing be made by any of them, &c., all serve for nothing, and may be avoided." In 2 Inst. 673, a bargain and sale enrolled by an infant is denied to be matter of record which the infant must avoid during his minority; but the book says, "he may avoid it when he will." An infant, or they who stand in his place, cannot plead "non est factum," and give the infancy in evidence; but they must plead the infancy specially, to avoid the deed; and that plea avoids it by relation back to the delivery. The reason of this is because it has an operation from the delivery, and not because it has the form of a deed. The deed of a feme covert has the form, but she may plead "non est factum," because it has no operation. The distinction between the deeds of femes covert and of infants is important; the first are void, the second voidable. Perkins, sect. 154,8 says: "And it is to be known that a deed cannot have and take effect at every delivery, as a deed; for if the first delivery take any effect, the second is void; as in case an infant makes a deed, and deliver the same as his deed, &c., and afterwards, when he comes of full age, delivers it again as his deed, this second delivery is void. But if a married woman deliver a bond unto me, or other writing, as her deed, this delivery is merely void, and therefore, if after the death of her husband, she, being single, deliver the same again unto me as her deed, the second delivery is good and effectual." Two objections were made at the bar to this proposition; at least in its extent. 1. That leases by an infant by deed, upon which no rent is reserved, are absolutely void; therefore the criterion "whether the deed is void or voidable," does not depend upon the delivery, but upon the matter and contents, "whether it may possibly be for the infant's benefit." 2. A surrender by an infant, by deed, is absolutely void; therefore all deeds are not voidable only. As to the first, there are many obiter sayings, but there is no sufficient authority clearly to outweigh the reasons against this posi-I cannot find a case adjudged singly upon this ground. What looks the likest to an authority is the opinion of Wray

¹ Sect. 259.

^{*} Title "Faites," p. 32.

² Cro. Eliz. 115; 1 Ld. Raym. 815.

and Southcote v. Gawdy, in Humphreston's case, 16 Eliz. Moore 105, and 2 Leon. 216, but there the judgment was upon the right and merits of the case, and not upon the point of the lease. The question as to the lease arose upon the fictitious lease to try the infant lessor of the plaintiff's title in ejectment. The two (Wray and Southcote) held "that no rent being reserved there was no semblance of benefit to the infant," whereas, in truth, it was greatly for his benefit. The objection was turning his own privilege of infancy against him, to bar his recovering. Besides, the lease was by parol.

But reason soon prevailed, and it has been long settled "that an infant may make a lease without rent, to try his title." Very prejudicial leases may be made, though a nominal rent be reserved; and there may be most beneficial considerations for a lease, though no rent be reserved. What seems decisive is "that the lessee can in no case avoid the lease on account of the infancy of the lessor," which shows it not to be void but voidable only. And it is better for infants that they should have an election. As to the second, the authority of Lloyd v. Gregory 2 was cited, and sayings arguendo, in Thompson v. Leach.

The case of Lloyd v. Gregory was determined upon the special verdict by three judges, of whom Sir William Jones and Croke were two. Sir William Jones reports "that the second lease being void, made an end of the question, and that the judges gave no opinion upon the other points." The note in Croke does not say a word of the only ground of the judgment, but rather supposes the second lease good, by arguing, "that there being no increase of term or diminution of rent, it had no semblance of benefit." Croke's note might be confounded with what passed upon the trial at bar, for Roll. states sayings to that effect upon the trial at bar. 1 Ro. Abr. 728.6 But Sir William Jones is certainly right, for the second lease was void. And no sur-

<sup>V. also s. c. in Benlo. 195; Owen,
64; Dyer, 337 a; 1 And. 40.</sup>

Lloyd v. Gregory is reported in Cro. Car. 502, and Sir William Jones, 405, and is abridged in 2 Ro. Abr. 24, title "Faites," letter I. pl. 6, and 495, title "Surrender," letter F. pl. 7, and in 1 Ro. Abr. 728, title "Enfants," letter B. pl. 2 and 3.

⁸ Mod. 296, 801; 2 Salk. 618; Parliament Cases, 150; 1 Shower, 296; Comberb. 488, 468; Carthew, 211, 435; Equity Cases Abridged, p. 278, pl. 3; 3 Salk. 800; 12 Mod. 173; and Holt, 857, 623.

⁴ Cro. Jac. 502.

⁸ Pl. 3.

render express or implied in order to, or in consideration of, a new lease, would bind, if the new lease is absolutely void, for the cause, ground, and condition of the surrender fails. Thompson v. Leach 1 (which was a most favorable case for the plaintiff), much is said in argument "to prove the surrender of an infant or lunatic to be void," to get rid of some doctrine laid down in Whittingham's case.2 That the remainder-man injured by the act could not avoid it. But more is said to overturn that doctrine. There is no difference in this respect, between the heir in tail and the remainder-man; neither claims under him whose act is in question, but both claim per formam doni. In Palmer, 254, Dodderidge denies the doctrine, and says: "He in remainder and the donor shall take advantage of infancy," which is agreeable to Littleton's reasoning, § 635; it should seem against reason, that a feoffment made by an infant should grieve or hurt another, to take from them their entry, &c. the comparison between an infant and a man non compos just (which it is not), the point of "the surrender being void or voidable" was not necessary to the judgment in that case. I know of no judgment upon the ground "that such a surrender is void." Most undoubtedly the other party cannot say so. If an infant was to surrender an unprofitable lease, and after acceptance the premises should be burnt, overflowed, or otherwise destroyed, the lessor never could say the surrender was void. There is no instance where the other party to a deed can object on account of infancy. Consequently the infant may let the surrender stand or avoid it, which proves it to be voidable only. If a new case should arise where it would be more beneficial to the infant "that the deed should be considered as void," if he might incur a forfeiture, or be subject to damages, or a breach of trust in respect to a third person, unless it was deemed void, the reason of the privilege would warrant an exception in such case to the general rule.

Powers of attorney are an exception to the general rule as to deeds; and a power to receive seisin is an exception to that. The end of the privilege is "to protect infants." To that object, therefore, all the rules and the exceptions must be directed. But be the point upon the solemnity of the delivery, as it may (for

¹ 1 Ld. Raym. 315.

^{*} In Darcy v. Jackson (to the third point of that case).

^{* 8} Co 43; H. 45 Eliz.

there are respectable sayings the other way), it is not necessary to our determination. For we are all of opinion "That the 1091. received, and the other circumstances of the transaction, show a semblance of benefit sufficient to make it voidable only, upon the matter of the conveyance." If it be voidable only, the second point is "whether the infant, by his entry before the assizes (which appears to be during his minority), has avoided it." At the common law, the only conveyance in pais of the freehold and inheritance of land with transmutation of possession, was by feoffment. If it was tortious, the disseisee was obliged to enter, to revest his possessory title; and then he might bring an action So in the case of feoffments by an infant; he might of trespass. enter during his minority to revest his possessory right for the sake of the profits; but still the feoffment was voidable only; and he might elect to confirm it when he attained his full age. The reason why an infant cannot bring any writ analogous to a dum fuit infra ætatem during his minority, is "that his election may not be bound by the judgment." Whether an entry be of any use in the present case is not material; it is sufficient, that it cannot have any larger effect than in the case of a feoffment. The infant is alive, still a minor. The defendant cannot elect for him; he is a mere stranger in every view, and has no estate affected by the conveyance. We are all of opinion that the plaintiffs ought to recover. And it is well for the defendant we are of this opinion. He would get nothing by defeating the plaintiffs here; for, finally, in another mode of proceeding, the conveyance must be confirmed; and the defendant would be to pay all the costs here and there. It is fortunate for the suitors on both sides, when, consistent with rules and forms of proceeding, that justice, which must be the final determination of the question, may be done in the first stage of the litigation.

The consequence of what has been said is, that

The postea must be delivered to the plaintiffs.

FETROW v. WISEMAN.

(40 Ind. 148. Supreme Court of Indiana, 1872.)

Acts of Infant, when voidable and when void. Suretyship. — Affirmance of Executory Contract. — Rule of Pleading and Evidence stated.

APPEAL from the Marion Circuit Court.

Buskirk, J. Wiseman sued John Fetrow before a justice of the peace, on the following note:—

"May 6th, 1859. One day after date we or either of us promise to pay Samuel S. Wiseman, or bearer, the sum of ninety-five dollars, for value received, without any relief from valuation or appraisement laws.

"JOSEPH FETROW,"

"JOHN FETROW."

John Fetrow alone appeared and answered under oath, denying the execution of the note. There was judgment for defendant, from which the plaintiff appealed to the Circuit Court. In the Circuit Court, the defendant, upon showing that the answer filed before the justice had been lost, was granted leave to file an amended answer, and therefore he filed an answer in two paragraphs. The first was the plea of non est factum; and the second, that, at the time when the note was executed, he was under twenty-one years of age. Both pleas were sworn to. There was no reply filed to the answer. By the agreement of the parties the cause was submitted to the Court for trial, and there was a finding for the plaintiff; and, over a motion for a new trial, there was judgment on the finding. The only valid assignment of error calls in question the correctness of the ruling of the Court, in overruling the motion for a new trial.

A reversal of the judgment is demanded in the first place, on the ground that there was a trial without an issue, for the reason that there was no reply to the answer.

The defendant, by consenting to go to trial without a reply, waived the objection, and cannot now be heard to complain of the irregularity. See Irvinson v. Van Riper, 34 Ind. 148; Train v.

Gridley, 36 Ind. 241. It is next claimed that the evidence established the fact that the defendant had not executed the note, and that the finding should have been in his favor upon that issue. We think otherwise. We are satisfied that the execution of the note by the defendant was established by a very decided preponderance of the evidence. We think it is shown by the evidence, that when the note was executed the defendant was an infant, and that he signed the note as the surety of his father, Joseph Fetrow. The note was executed the 6th of May, 1859. Joseph Fetrow, the principal in the note, died the 25th of March, 1864. The appellant was administrator. The estate was solvent, and was settled as such March 19th, 1868.

The appelles failed to file the note against the estate. It is even claimed that his failure to do so releases the appellant, who was only surety on the note. We think otherwise.

The appellee might have filed his note as a claim against the estate of Joseph Fetrow, deceased, but he was not bound to do so; and his failure to so file the claim did not defeat his right of action against the appellant.

It is in the next place contended by the appellant that he is not liable upon the note, for the reason that he executed the same as the surety of his father, when he was a minor. The position assumed is, that the contract of suretyship by a minor is absolutely void, and incapable of ratification upon his arriving at age. But it is maintained by the appellee that the contract was not void, but was voidable only, and therefore capable of ratification. The question is not free from doubt or difficulty, for no inconsiderable diversity of opinion is to be found in the authorities. The contracts of infants are divided into three classes; namely, first, those which are absolutely void; second, those which are only voidable; and third, those which are binding. 1 Story Con. 98. The authorities all agree that contracts made by infants for necessaries are binding.

It is well settled that a contract that is void is incapable of ratification; and it is as well and firmly settled that a contract which is voidable only may-be ratified, and rendered as binding and effectual as though it had been executed by an adult. The difficulty is in determining what contracts are void and what are voidable only. In Keane v. Boycott, 2 H. Black. 511, Lord Chief Justice Eyre laid down the doctrine, that where the Court

could pronounce the contract for the benefit of the infant, as for necessaries, it was good; where the Court could pronounce it to be to the prejudice of the infant, it was void; and in those cases where the benefit or prejudice was uncertain, the contract was voidable only. It was soon found that the above rule was subject to many modifications and exceptions. Thus in Tucker v. Moreland, 10 Pet. 58, Story, J., in speaking for the court, said: "It is apparent, then, upon the English authorities, that however true it may be that an infant may so far bind himself by deed in certain cases, as that in consequence of the solemnity of the instrument it is voidable only, and not void; yet, that the instrument, however solemn, is held to be void, if upon its face it is apparent that it is to the prejudice of the infant.

"This distinction, if admitted, would go far to reconcile all the cases; for it would decide that a deed, by virtue of its solemnity, should be voidable only, unless it appeared on its face to be to his prejudice, in which case it would be void." The above rule has become practically obsolete, and the modern doctrine on the subject may be regarded as settled, that all the contracts of an infant not in themselves illegal, as appointing an agent, are// voidable only. The law is thus laid down by Professor Parsons, in his work on "Notes and Bills:" "This incapacity or disability is intended for their benefit and protection against their own indiscretion, or the knavery of others. Hence the exception in respect to necessaries; for these a child must have. Hence, too, the old distinction between the void and voidable contracts of an infant, those being held to be voidable only which might be for . his benefit, while those were void which could do him no good. But this distinction we suppose to be practically obsolete; all the contracts of an infant, not in themselves illegal, being capable of ratification by him when an adult, and therefore being voidable only; for, if once absolutely void, no ratification could give them any force." 1 Parsons Notes and Bills, 67; Hunt v. Massey, 5 B. & Ad. 902; Gibbs v. Merrill, 3 Taunt. 307; Williams v. Moor, 11 M. & W. 256; Harris v. Wall, 1 Exch. 122; Reed v. Batchelder, 1 Met. 559; Aldrich v. Grimes, 10 N. H. 194; Edgerly v. Shaw, 5 Fost. (N. H.) 514; Goodsell v. Myers, 3 Wend. 479; Taft v. Sergeant, 18 Barb. 820; Cheshire v. Barrett, 4 McCord, 241; Little v. Duncan, 9 Rich. 55.

Tyler, in his valuable work upon "Infancy and Coverture," 54, admits that the tendency of modern decisions is to hold that the contracts of infants are voidable only, if not for necessaries. we come now to the examination of the authorities, in reference to the contract of suretyship entered into by an infant, and we are required to decide whether such contract is absolutely void, or voidable only. In Cockshott v. Bennett, 2 T. R. 763, it was held that the contract was void on the ground of fraud, and that any subsequent promise was a nudum pactum; but the Court proceeded to say that it was not void by reason of being a contract of suretyship. The Court say "This is not like a security given by an infant, which is only voidable; for that may be revived by a promise after he comes of age. In such case he is bound in equity and in conscience to discharge the debt, though the law would not compel him to do so; but he may waive the privilege of infancy, which the law gives him for the purpose of securing him against the impositions of designing persons. And if he choose to waive his privilege, the subsequent promise will operate upon preceding consideration." The same ruling was made and supported by the same arguments in the cases of Hinely v. Margaritz, 3 Pa. St. 428; Curtin v. Patton, 11 S. & R. 30.

Professor Parsons, in his work on "Contracts," says: "The better opinion, however, as may be gathered from the later cases cited in our notes, seems to be that an infant's contracts are none of them, or nearly none, absolutely void, that is, so far void that he cannot ratify them after he arrives at the age of legal majority. Such, at least, is the strong tendency of modern decisions." See Fonda v. Van Horne, 15 Wend. 631; Breckenridge's Heirs v. Ormsby, 1 J. J. Mar. 236; Scott v. Buchanan, 11 Humph. 468; Cole v. Pennoyer, 14 Ill. 158; Cummings v. Powell, 8 Tex. 80; The State v. Richmond, 6 Foster N. H. 232; Williams v. Moor, 11 M. & W. 256; 1 Am. L. Cas. 103. The case of Williams v. Moor, supra, is a very interesting and instructive case on the subject under discussion. PARKE, B., says that much of the confusion in the books and adjudged cases has grown out of the improper use of the words "void" and "voidable." He says that if by the word "void" is meant "incapable of being enforced," then the most of the contracts of infants are void; but if by the word "void" is meant "incapable of being ratified," then very few of the contracts of an infant are void. He further said that "the

principle on which the law allows a party who has attained his age of twenty-one years to give validity to contracts entered into during his infancy is, that he is supposed to have acquired the power of deciding for himself whether the transaction in question is one of a meritorious character by which in good conscience he ought to be bound." We have been referred by counsel for appellant to the following authorities as supporting their position, that a contract of suretyship entered into by an infant is void and incapable of being ratified when the infant has arrived to his legal majority: Maples v. Wightman, 4 Conn. 376; Allen v. Minor, 2 Call, 70; Wheaton v. East, 5 Yerg. 41; Merriam v. Cunningham, 11 Cush. 40; Burley v. Russell, 10 N. H. 184. The case in 4 Conn. (supra) is not in point, as the decision in that case was based upon a statute of that State, which provided "that no person under the government of a parent, guardian, or master shall be able to make any contract or bargain which, in the law, shall be accounted valid." The Court considered the above statute, to use their expression, "as raising the common law, and rendering absolutely void all contracts made within its prohibition." Such ruling, based upon such a statute, was undoubtedly correct.

The case in 2 Call is not much in point. In that case an infant had become security upon a twelvemonths replevy bond. He filed a bill in the high Court of Chancery, in which he alleged his infancy, and asked to be relieved from such suretyship. The Court held that he was entitled to the relief prayed for. The case does not seem to have received much consideration. The opinion of the Court is condensed into seven lines, in large type, in a small book.

In the case of Wheaton v. East (supra), the ruling was placed upon the general rule laid down by Lord Chief Justice Eyre in Keane v. Boycott, 2 H. Bl. 511, which is, "that, when the Court can pronounce the contract to be to the infant's prejudice, it is void, and when to his benefit, as for necessaries, it is good; and, when the contract is of an uncertain nature as to benefit or prejudice, it is voidable only at the election of the infant." The Court, after quoting the above language, proceed to say: "Thus the contract of an infant as security for another, the Court can see must be to his prejudice, for he can derive no benefit from it, therefore it is void; but a contract for

necessaries is plainly for his benefit, and therefore it is good, and binding upon him."

As we have heretofore seen, the above rule has become obsolete; and consequently a ruling based thereon cannot receive much consideration, as the reason upon which it is based no longer exists.

The cases referred to (supra) in 11 Cush. and 10 N. H. are not in point, for the reason that the question involved in each was whether an infant, who had represented himself to be of full age, and thus procured credit, was not estopped by such representations from setting up his infancy in avoidance of his contract, and it was held in both cases that he was not estopped from pleading his infancy. From a careful examination of the modern decisions and text-writers, we are satisfied that the following propositions may be regarded as settled: first, that an infant's contracts for necessaries are as valid and binding upon the infant as the contracts of an adult, and that such contracts cannot be disaffirmed, and need not be ratified before they can be enforced; second, the contract of an infant appointing an agent or attorney in fact is absolutely void, and incapable of ratification; third, any contract that is illegal, by reason of being against a statute or public policy, is absolutely void and incapable of ratification; fourth, all other contracts made by an infant are voidable only, and may be affirmed or disaffirmed by the infant at his election, when he arrives at his legal majority.

The second proposition may not be founded in solid reason, but is so held by all the authorities. Trueblood v. Trueblood, 8 Ind. 195; Pickler v. The State, 18 Ind. 266; Knox v. Flack, 22 Pa. St. 337; Waples v. Hastings, 3 Harring. Del. 403; Doe v. Roberts, 16 M. & W. 778; Story Agency, 463, 474, 477; 1 Am. Lead. Cas. (3d ed.) 248.

The contract of the appellant being voidable, it cannot be enforced unless it was affirmed by him after he arrived of age. It remains for us to inquire what acts will amount to a confirmation, and whether, under the pleadings of this cause, proof of such acts could be made.

What facts and circumstances will give binding force to the voidable acts and contracts of an infant depends very much upon the nature of the act to be ratified or confirmed. Words and acts

which operate as a ratification of an executed contract, may fall very far short of a confirmation of one that is wholly executory on the part of the infant. To make a voidable contract of an infant binding upon him, he must expressly ratify it after he attains to full age. A ratification will not be inferred from a mere acknowledgment of the debt; but a promise to pay after he has arrived at full age, with a knowledge that he is not liable, will amount to a ratification. Conaway v. Shelton, 8 Ind. 834; Conklin v. Ogborn, 7 Ind. 598. The law is stated with great clearness and force by Tyler in his work on "Infancy and Coverture," where he says: "The promises of an infant for the future payment of money, and all his executory contracts which are voidable, can be ratified only by a new promise to pay, or such express acts as will be equivalent to a new contract. The most that can be said of the original contract made during infancy is, that it is a valid consideration, and will afford aliment upon which to predicate a binding undertaking of the minor after he attains to full age. The original contract not being binding on the infant, the new promise must possess all the ingredients of a complete agreement. Anything short of this will fail to make the infant liable on the demand. So stringent is this doctrine, that a full acknowledgment or promise to pay a part, or even actual payment of a part, will not render the infant liable to pay the whole debt. This view is sustained by all the most approved authorities of the present day.

"As no agreement is complete until the minds of the parties meet, it follows that the new promise, to be binding on the infant, must be made to the creditor in person, or to his agent. The new promise of the infant must be voluntary, free, and with full knowledge that otherwise he would not be liable, and of course the promise must be made before the commencement of the suit to recover the demand." Tyler Infancy and Coverture, 86, Story states the rule: "In order to ratify an executory 87. agreement made during infancy, there must be not only an acknowledgment of primary liability, but an express promise, voluntarily and deliberately made by the infant upon his arriving at the age of maturity, and with the knowledge that he is not legally liable." For the convenience of future reference we cite the following authorities, which fully support the above doctrine: Goodsell v. Myers, 3 Wend. 479; Rogers v. Hurd, 4 Day, 57;

Wilcox v. Roath, 12 Conn. 550; Hale v. Gerrish, 8 N. H. 374; Bigelow v. Grannis, 2 Hill, N. Y. 120; Millard v. Hewlett, 19 Wend. 301; Watkins v. Stevens, 4 Barb. 168; Gay v. Ballou, 4 Wend. 403; Ford v. Phillips, 1 Pick. 202; Thompson v. Lay, 4 Pick. 48; Hubbard v. Cummings, 1 Greenl. 11; Thrupp v. Fielder, 2 Esp. 628; Harmer v. Killing, 5 Esp. 102; Whitney v. Dutch, 14 Mass. 457; Smith v. Mayo, 9 Mass. 60; Jackson v. Carpenter, 11 Johns. 539; Deason v. Boyd, 1 Dana, 45; Tucker v. Moreland, 10 Peters, 58; Hoit v. Underhill, 10 N. H. 220; Merriam v. Wilkins, 6 N. H. 432; Thornton v. Illingworth, 2 B. & C. 824; Thing v. Libbey, 16 Maine, 55; Curtin v. Patton, 11 S. & R. 305; Brooke v. Gally, 2 Atk. 34; Hinely v. Margaritz, 3 Barr (Pa.), 428; Mayer v. McLure, 36 Miss. 389; Boody v. McKenney, 23 Maine, 517. Evidence was offered tending to prove a ratification of the contract by the appellant after he had arrived at age; and if such evidence was admissible under the issues, and was properly considered by the Court in deciding the cause, it may have been sufficient to establish a ratification of the contract; but this we do not decide. Could the Court consider the evidence which was admitted to prove the ratification? The appellant pleaded his infancy. The plaintiff failed to reply, but the defendant consented to go to trial without a reply, and we have repeatedly held that was a waiver of the reply, and that we would regard the answer as denied. This is as far as we have gone. We have never held that a party who fails to answer a complaint or reply to an answer could prove any affirmative matter, and do not think that such should be the rule. The Court or the opposite party would have no means of knowing what affirmative matter might be pleaded.

The appellant having proved that he was an infant when he executed the note, he defeated a recovery thereon unless the plaintiff established a new promise. The recovery must be on the new promise, which is supported by the original consideration. It was, therefore, incumbent upon the plaintiff to reply a ratification. Williams v. Moor, 11 M. & W. 256; Cohen v. Armstrong, 1 M. & S. 724; Thornton v. Illingworth, 2 B. & C. 824; Hartley v. Wharton, 11 A. & E. 934; McKyring v. Bull, 16 N. Y. 297. Where secondary evidence bearing on the issue

¹ See this case (post).

^{*} See this case (post).

² Post.

is admitted without objection, it should be considered, because it was pertinent and tended to establish the issue, and it was the fault of the opposite party that he did not require better evidence. But in this case the evidence did not tend to support any issue in the cause.

The question of ratification was altogether foreign to the case. Brown v. Perry, 14 Ind. 32.

The infancy of the defendant having been proved, he defeated the action, and it results that the Court erred in finding for the plaintiff, for which error the judgment must be reversed.

The judgment is reversed with costs; and the cause is remanded for a new trial, with leave to the plaintiff to reply to the answer setting up infancy.

Saunderson v. Marr.

(1 H. Black. 75. Court of Common Pleas, 1788.)

Infant's Warrant of Attorney. -

THE defendant, being an infant, joined with his brother in giving a warrant of attorney to the plaintiff to confess a judgment, which was accordingly entered up, and the defendant taken in execution. In order to procure his discharge, he alone gave a second warrant of attorney, on which judgment was again entered and he again taken in execution. On this a rule was granted to show cause why the last judgment should not be set aside, and the warrant of attorney cancelled, on the ground that the defendant was an infant at the time of giving it. Marshall, Serjt., showed for cause a declaration of the defendant when he gave the second warrant of attorney, that he would take no advantage of his infancy, a promise to pay the debt, and some circumstances of collusion between him and his brother. This application, Marshall said, was made to the equitable jurisdiction of the Court; and in equity the acts of an infant are often confirmed; such as an agreement to settle an estate, and the like. But the Court said: such acts of an infant as are only voidable are allowed in equity to be confirmed, but not such as are actually

void. A warrant of attorney is of the latter description, which the Court cannot make good, though there appear circumstances of fraud on the part of the infant.

Rule absolute without costs.

TRUEBLOOD v. TRUEBLOOD.

(8 Ind. 195. Supreme Court of Indiana, 1856.)

Infant's Agent.

APPEAL from the Vigo Circuit Court.

Perkins, J. Bill in chancery, under the old practice, to compel a specific performance and set aside a fraudulent deed. dismissed. The facts of the case, so far as material to its decision, are as follows: In 1845, William Trueblood was an infant, ' and owner of a piece of land. At that date Richard J. Trueblood, the father of said William, executed a title-bond to one Nathan Trueblood, whereby he obligated himself to cause to be conveyed to him, said Nathan, the piece of land belonging to William, after the latter should become of age. The conveyance was to be upon a stated consideration. The bond is single, simply the bond of Richard, — and William is nowhere mentioned as a party, but his name is signed with his father's at the close of the condition, as may be supposed, in signification of his assent to the execution of the instrument by his father. shall so treat his signature to the bond. After William became ! of age, it is claimed that he ratified the bond, and afterwards sold and conveyed the land to another, Robert Lockridge, who had notice, &c. This bill was filed in order to have the deed to Lockridge set aside, and a conveyance decreed to Nathan Trueblood, pursuant to the terms of the bond. The Court below, as

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State, 18 Ind. 266; Matteux v. St. Aubin, 2 W. Black. 1133; Ashlin v. Langton, 4 Moore & Scott, 719; Kinnersley v. Mussen, 5 Taunt. 264; Oliver v. Woodroffe, 4 M. & W. 650.

Penn. St. 337; Waples v. Hastings, 8
Harring. 403; Carnahan v. Alderdice,
4 Harring. 99; Bennett v. Davis, 6
Cow. 393. See also Pickler v. The

we have stated, refused to enter such a decree, and held, as counsel inform us, that the bond was not susceptible of ratification by William Trueblood; and whether it was or not is the important question in the case; for, if the bond was not susceptible of such ratification, we need not inquire into the alleged facts which it is claimed evidence that such an act had been done. seen, the bond is not in terms the bond of William Trueblood. He could not, by virtue of its express provisions, be sued upon it. Where a father signs his name to articles of apprenticeship of his son, simply to signify his assent to them, he cannot be a party to a suit upon the articles. 5 Ind. R. 538. If the bond, then, can in any light be regarded as the contract of William Trueblood, it must be because his father may be considered his agent in exe-Can, then, an infant, after arriving at age, ratify the cuting it. act of his agent performed while he was an infant? This depends upon whether his appointment of an agent is a void or voidable If the former, it cannot be ratified (5 Ind. R. 353); if the act latter, it can be. Reeve's Dom. Rel. 240. In the first volume of American Leading Cases (3d/ed.), p. 248 et seq., the doctrine is laid down as the result of the American cases on the subject, that the only act an infant is incapable of performing, as to contracts, is the appointment of an agent or attorney. Whether the doctrine is founded in solid reason, they admit may be doubted; but assert that there is no doubt but that it is law. See the cases there collected. The law seems to be held the same in England. In Doe v. Roberts, 16 M. & W. 778, a case slightly like the present in some respects, the attorney, in argument, said: "Here a tenancy has been created, either by the children, or by Hugh Thomas acting as their agent." PARKE, B., replied: "That is the fallacy of your argument. An agreement by an agent cannot bind an infant. If an infant appoints a person to make a lease, it does not bind the infant, neither does his ratification bind him. There is no doubt about the law; the lease of an infant, to be good, must be his own personal act." So, here, had the bond been the personal act of the infant, he could have ratified it. It would have been simply voidable. But the bond of his agent, or | one having assumed to act as such, is void, and not capable of being ratified. See 8 Blackf. 345. The decree below must therefore be affirmed with costs.

Per Curiam. — The decree is affirmed with costs.

WHITNEY et al. v. DUTCH et al.

(14 Mass. 457. Supreme Court of Massachusetts, 1817.)

Partnership. - Liability of Infant Partner.

Assumpsit on a promissory note, made by the defendants to the plaintiffs, on the 18th of December, 1811, for eight hundred and forty-seven dollars and seventy-six cents. The defendant Dutch The defendant Green pleaded: 1. The general was defaulted. 2. That he was under age at the time when the note was The plaintiffs replied, that after he came of age he agreed to and confirmed the promise; to which he rejoined, that he did not so agree, on which also issue was joined. It appeared at the trial, which was had at the last November term in this county before Jackson, J., that Dutch and Green, while the latter was under age, had agreed to be partners, and as such had often dealt with the plaintiffs. The note in question was signed by Dutch, using the firm and style of the house of Dutch & Green, at a time when the latter was under age. In March, 1816, after Green arrived at full age, the plaintiffs applied to him for payment of the note; when he acknowledged that it was due, and promised that, on his return to Eastport, where he resided, he would endeavor to procure the money and send it to the plaintiffs, saying at the same time that it was hard for him to pay it twice; he alleging, as it was understood, that the supposed partnership had been a long time before dissolved, and that Dutch had taken the whole stock, and agreed to pay all the debts of the company. The counsel for the defendant contended that the implied power of one partner to bind the other was void in this case, as Green was a minor at the time of making the note, and therefore could not empower any agent or attorney to bind him in any manner; that the note was therefore void as to him, and not merely voidable, and so the supposed promise could not be confirmed or ratified by the subsequent promise or agreement, which was proved, as above mentioned. The judge, intending to reserve the question for the consideration of the whole Court, directed a verdict for the plaintiffs on both issues, which was returned accordingly.

If the Court should be of opinion that the defendant Green was, under these circumstances, liable to the plaintiffs for the amount due on this note, the verdict was to stand, and judgment entered accordingly; otherwise the verdict was to be set side, and a verdict entered for the defendants.¹

PARKER, C. J., delivered the opinion of the Court. The question presented to the Court in this case, and which has been argued, is, whether the issue on the part of the plaintiffs is maintained by the evidence reported. The first objection taken by the defendant's counsel is, that no express promise is proved after the coming of age of the defendant. By the authorities, a mere acknowledgment of the debt, such as would take a case out of the statute of limitations, is not a ratification of a contract made during minority. The distinction is undoubtedly well The reason is, that a mere acknowledgment avoids the presumption of payment, which is created by the statute of limitations; whereas the contract of an infant may always, except in certain cases sufficiently known, be voided by him by plea, whether he acknowledges the debt or not, and some positive act or declaration on his part is necessary to defeat his power of But the terms of ratification need not be such as to import a direct promise to pay. All that is necessary is, that he expressly agrees to ratify his contract; not by doubtful acts, such as payment of a part of the money due, or the interest, but by words, oral or in writing, which import a recognition and a confirmation of his promise. In the present case, the defendant acknowledged that the money was due, when called upon to pay the demand, and promised that he would endeavor to procure the money upon his return home, and send it to the plaintiff. was sufficient to satisfy the jury that he assented to and ratified the original promise, for it would be a distortion of language to suppose that he meant only to endeavor to persuade Dutch to pay the money, and if he succeeded, that he, Green, would send it to the plaintiff. But the other point made in the defence is more difficult, and presents a question new to us all. This is, that the note, being signed by Dutch for Green, was void in regard to Green, because he was not capable of communicating authority to Dutch to contract for him; and that, being void, it is not the subject of a subsequent ratification. No such question

¹ Arguments of counsel are omitted. — ED.

appears to have occurred in our courts, nor in those of England, or of the neighboring States. Partnerships have not been uncommon between adults and infants, and simple contracts, signed by one for both, undoubtedly have often been made. It is unfavorable to the principle contended for by the counsel for Green that no such case has been found; for this silence of the books authorizes a presumption that no distinction has been recognized between acts of this kind done by the infant himself, and those done for him by another.

We must, however, examine the principles by which the contracts of infants are governed, and see if, by any analogy to settled cases, the present defence can be maintained. admitted, generally, that a contract made by an infant, although not for necessaries, is only voidable; and that an express adoption of it, after he comes of age, will make it valid from its. Nor does the law require that he shall be sued, as upon the new promise, but gives life and validity to the old one, after it is thus assented to. But it is urged that this doctrine applies only to those contracts which are made by the infant personally, and that the delegation of power by him to another of full age to act for him is utterly void, and that no contract made in virtue of such delegation can subsist, so as to be made good by subsequent agreement or ratification. (If we confine ourselves to the letter of the authorities, it would seem that this doctrine is correct, for we find that, in the distinction made in the books between the void and voidable acts of an infant, a power of attorney is generally selected, by way of example, as an act absolutely void, unless it be made to enable the attorney to do some act for the benefit of the infant, such as a power of attorney to receive seisin in order to complete his title to an estate. The books are not very clear upon this subject. All of them admit a distinction between void and voidable acts, and yet disagree with respect to the acts to be classed under either of those One result, however, in which they all appear to agree, is stated by Lord Mansfield, in the case of Zouch v. Parsons, cited in the argument, viz., that, whenever the act done may be for the benefit of the infant, it shall not be considered void; but that he shall have his election, when he comes of age, to affirm or avoid it; and this is the only clear and definite proposition which can be extracted from the authorities. The application

of this principle is not, however, free from difficulty, for when a note or other simple contract is made by an infant himself, it may be made good by his assent, without any inquiry whether it was for his benefit or to his prejudice. For, if he had made a bad bargain in a purchase of goods, and given his promissory note for the price; and when he came of age had agreed to pay the note, he would be bound by his agreement, although he might have been ruined by the purchase. Perhaps it may be assumed, as a principle, that all simple contracts by an infant, which are not founded on an illegal consideration, are strictly not void, but only voidable, and may be made good by ratifica-They remain a legal substratum for a future assent, until tion. avoided by the infant; and if, instead of avoiding, he confirm them when he has a legal capacity to make a contract, they are in all respects like contracts made by adults. With respect to contracts under seal, also, they are in legal force as contracts until they are avoided by plea. Whether they can in all cases, as it is clear they can in some, such as leases, be ratified, so as to prevent the operation of a plea of infancy, except by deed, need not now be decided. A deed of land, by an infant having the title, would undoubtedly convey a seisin, and the grantee would hold his title under it until the infant, or some one under him, should by entry or action avoid it. Perhaps it cannot be contended, against the current of authorities, that an act done by another for an infant, which act must necessarily be done by letter of attorney under seal, is not absolutely void, although no satisfactory reason can be assigned for such a position. But as this is a point of strict law, somewhat incongruous with the general rules affecting the contracts of infants, it is not necessary nor reasonable to draw inferences which may be repugnant to the principles of justice which ought to regulate contracts between man and man. The object of the law, in disabling infants from binding themselves, is to prevent their being imposed upon and injured by the crafty and designing. object is in no degree frustrated by giving full operation to their contracts, if, after having revised them at mature age, they shall voluntarily and deliberately ratify and confirm them. enough that they may shake off promises and other contracts made upon valuable consideration, if they see fit to do it, when called upon to perform them. To give them still another oppor-

tunity to retract, after they have been induced, by love of justice and a sense of reputation, to make valid what was before defective, will be to invite them to break their word and violate their engagements. If it be true that all simple contracts made by infants are only voidable, the inquiry in this case should be, whether the facts stated furnish an exception to this general rule; or whether the contract now sued is in any sense different from a simple contract. The only ground for the supposed exception is, that the note declared on was not signed by the infant himself, but by Dutch, claiming authority to sign his name as a copartner. If the authority required a letter of attorney under seal, the exception would be supported by the authorities which have been alluded to. But it is well known that copartners may, and generally do, undertake to bind each other without any express authority whatever. Indeed, the authority to do so results from the nature and legal qualities of copartnership. And without any such union of interests, one man may have authority to bind another by note or bill of exchange, by oral, or even by implied, authority. of a deed, therefore, is entirely out of the question; so that the defendant does not bring himself within the letter of the authorities, and certainly not within the reason on which they are Then, upon principle, what difference can there be between the ratification of a contract made by the infant himself and one made by another acting under a parol authority from him? And why may not the ratification apply to the authority as well as to the contract made under it? It may be said that minors may be exposed if they may delegate power over their property or credit to another. But they will be as much exposed by the power to make such contracts themselves, and more, for the person delegated will generally have more experience in business than the minor. And it is a sufficient security against the danger from both these sources that infants cannot be prejudiced; for the contracts are in neither case binding, unless when arrived at legal competency they voluntarily and deliberately give effect to the contract so made. And in such case justice requires that they should be compelled to perform them. these principles we are satisfied with the verdict of the jury, and are confident that no principles of law or justice are opposed by confirming it. Judgment on the verdict.

NIGHTINGALE v. WITHINGTON.

(15 Mass. 272. Supreme Judicial Court of Massachusetts, 1818.)

Indorsement by Infant.

Assumpsit on a promissory note made by the defendant, payable to Robert Vose or order, and by him indorsed to the plaintiff.

The action was submitted to the determination of the Court, upon the following facts agreed by the parties. The defendant made the note declared on, in consideration of the labor and services of the said Robert Vose, who then was, and yet continues, under the age of twenty-one years. He indorsed the same in blank for a valuable consideration to one Jacob Bacon; and this latter, for a like consideration, transferred it by delivery to the plaintiff, who, as well as the said Bacon, then knew the said Vose to be under age.

The defendant, since the said indorsement, and after notice of it, paid the account due by the note to Reuben Vose, father of the said Robert, taking from him the following receipt or discharge; viz., "Received of A. M. Withington fifty-one dollars, in full payment for a note and interest given to my son Robert by him, Feb. 22, 1817. Reuben Vose. Milton, Feb. 28, 1818."

The parties agreed that judgment should be rendered upon the default of the defendant, or the nonsuit of the plaintiff, as the opinion of the Court should be upon the foregoing facts.¹

Parker, C. J. That an infant may indorse a negotiable promissory note, or a bill of exchange made payable to him, so as to transfer the property to an indorsee for a valuable consideration, seems to be well settled in the law merchant, and is noways repugnant to the principles of the common law. Such indorsement is not like one made by a *feme covert*; for a note payable to her becomes the property of her husband; and, further, her acts are absolutely void, whereas those of an infant are voidable only.

1 Arguments omitted.

It would be absurd to allow one who has made a promise to pay to one who is an infant, or his order, to refuse to pay the money to one to whom the infant had ordered it to be paid, in direct violation of his promise; and it would impair the value of such contracts in the hands of infants, if they were unable to raise money on them as others may do. Whether an infant may avoid an indorsement so made and oblige the promisor to pay to him, is a question not arising in this case; for there has been no countermand or revocation of the order to pay, which is implied in his indorsement.

If an action should be brought against the infant, as indorser, for the default of payment by the promisor, without doubt he may avoid such action by a plea of infancy. But that is a personal privilege which none but himself can set up, in avoidance of any contract made in his favor.

It is said, however, that the promise of which this note was the evidence was made in consideration of the earnings by the labor of the infant; and that those earnings accrued to his father, who, having received payment of the note after the indorsement, has intercepted the plaintiff's right to recover.

We must see what are the rights of a father over the earnings of his son, in order to determine the merits of this objection. Generally, the father, and, in case of his death, the mother, is entitled to the earnings of their minor children. This right must be founded upon the obligation of the parents to maintain and support their children; which obligation is compensated by a right to their services, or to the fruits of them if, by their permission, they are employed by other persons.

But where the father has discharged himself of the obligation to support the child, or has obliged the child to support himself, there is no principle, but that of slavery, which will continue his right to receive the earnings of the child's labor.

Thus, if the father should refuse to support a son, should deny him a home, and force him to labor abroad for his own living,—or should give or sell him his time, as is sometimes done in the country (although this latter practice is certainly questionable as to any promise made in consideration of it),—the law will imply an emancipation of the son; and, although it will not enable him to contract to his prejudice, it will give him the benefit of such contracts as are made with him for his services;

and a payment made to the son in such circumstances will be a good discharge of such contract.1

In the case before us, the money sued for was due for the labor and service of Robert Vose, the minor. It does not appear that the services were contracted for by the father, or that he made any claim for the money due for them.

But a negotiable promissory note was given to the son, who was then permitted, as far as can be discovered by the facts, to make the contract for himself, and to receive the payment. There was no prohibition by the father to make payment to the son; and it was not until after he had parted with the note for a valuable consideration, — a fact known to the father, — that he received payment of the note; and even then it does not appear that he claimed the money as his right; but that the payment was altogether voluntary by the defendant, who had full notice of the indorsement.

These circumstances warrant us in deciding that such payment shall not avail the defendant.

Defendant defaulted.

HOLT v. WARD CLARENCIEUX.

(2 Strange, 987; s. c. id. 850; 1 Barnard. K. B. 247, 277, 888; 2 id. 12, 173, 176. Court of King's Bench, 1732.)

Infant's Contract of Marriage.

The plaintiff declared that it was mutually agreed between the plaintiff and defendant, that they should marry at a future day, which is past, and that, in consideration of each other's promises, each engaged to the other; notwithstanding which the defendant did not marry the plaintiff, but had married another, which she lays to her damage of 4,000l.

The defendant, with leave of the Court, pleaded double; viz., non assumpsit, and that the plaintiff at the time of the promise was an infant of fifteen years of age. The plaintiff joins issue on the non assumpsit, and a verdict is found for her with 2,000l. damages.

¹ Benson v. Remington, 2 Mass. 113; 1 Black. Comm. 453.

And as to the plea of infancy demurred.

This cause was several times argued at the bar. 1. By Mr. Strange for the plaintiff, and Sergeant Chapple for the defendant, when the Court inclined strongly with the plaintiff, because, though the defendant would not have the same remedy against her by action for damages, yet they thought he might have some remedy, viz., by suit in the ecolesiastical Court to compel a performance, the plaintiff being of the age of consent; and that would be a sufficient consideration. And therefore appointed an argument by civilians, to see what their law would determine in such a case.

Upon the arguments of the civilians, no instance could be shown wherein they had compelled the performance of a minor's contract. And they who argued for the defendant strongly insisted that, in the case of a contract per verba de futuro (as this was), there was no remedy, even against a person of full age, in the spiritual Court, but only an admonition.

And the only reason why they hold jurisdiction in the case of a contract per verba de præsenti is, because that is looked upon amongst them to be ipsum matrimonium, and they only decree the formality of a solemnization in the face of the church.

After their arguments, it was spoke to a fourth time by Mr. Reeve and Sergeant Eyre. And now this term the chief justice delivered the resolution of the Court.

The objection in this case is, that, the plaintiff not being bound equally with the defendant, this is nudum pactum, and the defendant cannot be charged in this action.

Formerly it was made a doubt by my Lord VAUGHAN, whether any action could be maintained on mutual promises to marry; but that is now a point not to be disputed. And as to the present case, we should have had no difficulty in giving judgment for the plaintiff if we could have been satisfied by the arguments of the civilians, that, as the plaintiff was of the age of consent, any remedy, though not by way of action for damages, could be had against her. But, since they seem to have had no precedent in the case, we must consider it upon the foot of the common law.

And upon that the single question is, whether this contract as against the plaintiff was absolutely void.

¹ 8 Mod. 511; Salk. 487; Carter, 236.

And we are all of opinion that this contract is not void, but only voidable at the election of the infant, and as to the person of full age it absolutely binds.

The contract of an infant is considered in law as different from the contracts of all other persons.

In some cases his contract shall bind him; such is the contract of an infant for necessaries, and the law allows him to make this contract as necessary for his preservation; and therefore in such case a single bill shall bind him, though a bond with a penalty shall not. 1 Lev. 87.

Where the contract may be for the benefit of the infant, or to his prejudice, the law so far protects him as to give him an opportunity to consider it when he comes of age, and it is good or voidable at his election. Cro. Car. 502; 2 Roll. 24, 427; Hob. 69; 1 Brownl. 11; 1 Sid. 41; 1 Vent. 21; 1 Mod. 25; Sir W. Jones, 164.

But though the infant has this privilege, yet the party with whom he contracts has not; he is bound in all events. •

And as marriage is now looked upon to be an advantageous contract, and no distinction holds whether the party suing be man or woman; but the true distinction is whether it may be for the benefit of the infant; we think, that, though no express case upon the marriage contract can be cited, yet it falls within the general reason of the law with regard to infants' contracts. And no dangerous consequence can follow from this determination, because our opinion protects the infant, even more than if we rule the contract to be absolutely void. And as to persons of full age, it leaves them where the law leaves them, which grants them no such protection against being drawn into inconvenient contracts. For these reasons we are all of opinion that the plaintiff ought to have her judgment upon the demurrer.

PETERS v. FLEMING.

(6 Meeson & Welsby, 42. Court of Exchequer, 1840.)

Rule as to Infant's Necessaries.

This was an action of debt for goods sold and delivered, work and labor done, and materials found and provided, and for money found to be due upon an account stated. The defendant pleaded:

1. Nunquam indebitatus.

2. Infancy. The plaintiff took issue on the first plea, and to the second replied, "that the goods, &c., at the time of the sale and delivery thereof, were necessaries suitable to the then degree, estate, and condition of the defendant."

The rejoinder traversed that allegation, and thereupon issue was joined. The cause was tried before Vaughn, J., at the last summer assizes for the county of Cambridge, when it appeared that the action was brought to recover the amount of the following articles:—

		£	8.	d.
A fine gold ring	•	1	8	0
A ring, engraved crest, &c	•	0	18	0
A short gold watch-chain	•	2	2	0
A pair of pins	•	0	18	0
A ring	•	1	6	0
A ring	•	1	5	0
A ring repaired, new stone	•	0	8	6
		£8	0	6

The defendant was the eldest son of a gentleman of fortune, and a member of parliament, and, at the time when the goods were supplied and the work was done, was an undergraduate of the university of Cambridge, and resided in the university.

The learned judge left it to the jury to say whether, in their opinion, the articles in question were necessaries or not, and they found that they were, upon which the learned judge directed them to find a verdict for the plaintiff for the full amount claimed, but gave the defendant leave to move to enter a nonsuit.

Biggs Andrews having, in last term, obtained a rule accordingly, or for a new trial,

Kelly and Byles now showed cause. The case was properly left to the jury, and they have come to a correct conclusion in finding that the articles in question were necessaries for a person in the defendant's station in life. If things of such a nature are necessaries in any case, they certainly must be so for the son and heir of a gentleman of fortune and a member of parliament. The jury are the proper judges whether the quality or nature of the ornaments supplied are suitable to the defendant's rank in Hands v. Slaney, 8 T. R. 578, is an authority to show that the term "necessaries" is not limited to the bare necessaries of life, but extends to such things as are necessary according to the station and degree of the party; and it was there held, that a minor, a captain in the army, was liable for a livery ordered for his servant, because the defendant was placed in a situation of life which required such an attendant. Lord Kenyon there says: "The general rule is clear, that infants are liable for necessaries according to their degree and station in life." In the present case the defendant was a person receiving a university education, and for whose position in society a watch-chain and a seal would be proper and useful articles; the one to enable him to pull out his watch, the other to seal his letters to his father or his The other articles were also proper for a person in his station of life. But it was a question for the jury whether these articles, or any of them, were proper and necessary for the defendant, and if any of them was necessary, there cannot be a nonsuit; and the amount is too trifling for the Court to grant a new trial, on the ground of the verdict being against the weight of evidence.

Sir William Follett, Biggs Andrews, and Gunning, contra. In this case no question ought to have been left to the jury at all, as the defendant was not competent to enter into a contract for articles of this nature, which was mere ornamental articles of jewelry. An infant is incapable of contracting for that which is not requisite for him as a matter of necessity, such as "meat, drink, apparel, necessary physic, and such other necessaries, and likewise for his necessary teaching." Co. Litt. 172 a. In Manby v. Scott, 2 Sid. 113, it is said: "Our law allows many persons to make contracts in cases of necessity who otherwise

would be disabled from doing so; and, although generally the contracts of infants are void, yet, in cases of necessity, their contract shall bind them." So, in Brooke v. Gally, 2 Atk. 34, Lord Hardwicke says: "The law lays infants under a disability of contracting debts, except for bare necessaries, and even this exemption is merely to prevent them from perishing." According to those cases, an infant cannot bind himself but for such things as are strictly necessary for him. [PARKE, B. A watch may, in some cases, be a thing necessary. In Burghart v. Hall, 4 M. & W. 727, it was decided that you must lay out of the question the allowance of a suitable maintenance to the infant. The only question is, whether the things themselves are necessaries suitable to his station and degree or not. It will be very difficult to maintain that the judge can withdraw the question from the jury, whether such an article as a watch is not necessary, and if a watch be necessary, a chain must be so also, to draw it out of his pocket, for a boy of any age.] If articles of this description are to be considered as necessaries, where is the line to be drawn? [Alderson, B. The term "necessaries," as applied to dress, may mean those things without which the party would lose caste in society. The quantity of the things furnished may be important; as, for instance, if twenty breastpins had been supplied, they could scarcely be necessary.] What came within the term "necessaries" was, according to the old cases, a question for the judges; and in Mackerell v. Bachelor, Goldsborough, 168, Cro. Eliz. 583, cited by Lord Ellenborough in Maddox v. Miller, 1 M. & Sel. 738, the judges decided that some of the articles were not necessaries for the defendant, and that the action would not lie for them; although certainly in Maddox v. Miller it was held to be not so purely and exclusively a question of law as that some question should not be left to the jury; but there the supply was of ordinary clothes. Here none of these articles are strictly necessaries, and there could be no difficulty in laying down a rule that an infant cannot bind himself for such things as these. If an infant wants articles of such a nature, he should be made to pay for them at the time of the The rule to be collected from the books is, that an infant can bind himself only for such things as are "necessaries," which, according to the old law, were such things as a person could not do without. [PARKE, B. No; it always had

been the law from the first that an infant might bind himself for what was suitable to his state and degree. That was shown in the argument in Burghart v. Hall. The law has always been the same in this respect.] But these articles were not even useful; they were mere ornaments, and could not be necessary, in the proper sense of the word, for any one.

PARKE, B. It seems to me that in this case the learned judge could not have been properly called upon by the defendant to nonsuit the plaintiff, and that there was some evidence to go to the jury in support of the allegation in the replication, that the goods were, at the time of the sale and delivery thereof, "necessaries suitable to the then degree, estate, and condition of the defendant." The decision of this question does not depend in any degree upon any allowance the defendant may have had from his father, and which he may have misapplied; that must be considered as settled by the case of Burghart v. Hall; but the question is, whether the articles furnished are properly such articles as are necessary and suitable to the station, degree, and condition of the defendant. It is perfectly clear that, from the earliest time down to the present, the word "necessaries" was not confined, in its strict sense, to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, station, and degree in life in which he is; and therefore we must not take the word "necessaries," in its unqualified sense, but with the qualification above pointed out. Then the question in this case is, whether there was any evidence to go to the jury that any of these articles were of that description. I think there are two that might fall under that description; viz., the breastpins and the watch-chain. The former might be a matter either of necessity or of ornament; the usefulness of the other might depend on this, whether the watch was necessary. If it was, then the chain might become necessary itself. Now it is impossible for us to say that a judge could withdraw it from the consideration of the jury, whether a watch was not a necessary thing for a young man at college, and of the age of eighteen or nineteen, to have. That being so, it is equally, as far as the chain is concerned, a question for the jury; there was, therefore, evidence to go to the jury. The true rule I take to be this, — that all such articles as are purely ornamental are not necessary, and are to be rejected because they

cannot be requisite for any one; and for such matters, therefore, an infant cannot be made responsible. But, if they are not strictly of this description, then the question arises, whether they were bought for the necessary use of the party, in order to support himself properly in the degree, state, and station of life in which he moved; if they were, for such articles the infant may be responsible. That must be a question for the jury, and it is for them to decide, upon due consideration, whether the articles were of such a description or not; and here the jury have found that they were. It is impossible to say that there was not some evidence to go to the jury in the present case; that being so, it becomes unnecessary for us to inquire as to the other matters charged for.

ALDERSON, B. If it were laid down strictly that an infant can make no contract except for articles that would be necessary to keep him from famishing, that would be a rule which would press very hardly indeed in many cases. But that is not the rule; for a party may make contracts for necessary clothes, and for necessary education. It has been ruled that an infant may be liable for schooling, and if it become a question how much schooling is necessary, then you must inquire what situation in life he is required to fill. A knowledge of the learned languages may be necessary for one, a mere knowledge of reading and writing may be sufficient for another. The real question would be, whether or not what he has contracted for be such as a person in his station and rank in life would require. The articles must be for real use, and such as would be necessary and suitable to the degree and station in life of the infant. tion in these cases is this, — Were the articles bought for mere ornament? if so, they cannot be necessaries for any one. If, however, they are bought for real use, then they may be necessaries, provided they are suitable to the infant's age, state, and The jury then must say, whether they are such as reasonable persons of the age and station of the infant would require for real use. If so, they will be necessaries, for which an infant will be liable.

GURNEY, B. I think my brother PARKE has laid down the principle most correctly. If the articles are merely ornamental, the party cannot recover. What may be ornamental, and what necessary, is a question for the jury. In this case the jury have

found that these articles were necessary; as to two of them it appears to us the jury were right; and it is admitted that it is not worth while to discuss the precise amount.

ROLFE, B. The difficulty in this case arises from the vague and uncertain nature of the word "necessary." I think the explanation given by my brother ALDERSON is the best that can be given, viz., that that is necessary which is bona fide purchased for use, and not merely for ornament, and which consorts with the condition and rank in life in which the party moves. One of these articles, at all events, and I think two, clearly might come under that description, and therefore the matter was properly left to the jury.

Rule discharged.

BAINBRIDGE v. PICKERING.

2 Wm. Black. 1325. Court of Common Pleas, 1779.)

Infant when not liable for Necessaries.

DAVY moved to discharge the defendant on a common appearance, being held to special for 30*l*. Debt to a milliner for feathered caps and other ornamental apparel; and it being proved by a copy of the parish register that the defendant was now under twenty years of age, and the debt was of two years' standing, she living all the time with her mother.

Grose showed for cause that the Court will not discharge her upon motion, but leave her to plead her infancy, as these things might be necessary for her state and situation in life, of which the jury are the proper judges. But by Gould, Justice (absente De Grey, Chief Justice): If an infant lives with her parent, who provides such apparel as appears to the parent to be proper, so that the child is not left destitute of cloaths, or other real necessaries of life, I apprehend that the child cannot bind herself to a stranger even for what might otherwise be allowed as necessaries; for no man shall take upon him to dictate to a parent what cloathing the child shall wear, at what time they shall be purchased, or of whom. All that must be left to the discretion of the father or mother. And as there is not here any pretence

but that the child was decently provided for by the mother, I think we should give no countenance to such persons as inveigle young women into extravagance under the pretext of furnishing them with necessaries, without the previous consent of the parent.

BLACKSTONE and NARES, Justices, of the same opinion.

Rule absolute.

ELLIOTT v. HORN.

(10 Ala. 848. Supreme Court of Alabama, 1846.)

Acts binding upon Infants. — Conveyance by Infant Trustee.

Error to the Circuit Court of Greene.

Trespass to try title, by the defendants against the plaintiffs in error, to eighty acres of land in Greene County.

From a bill of exceptions it appears, that the plaintiffs, to prove title to the land sued for, produced and read a patent from the United States to one John Cobb, bearing date the 20th of August, 1826, and a deed for the said land, executed by John Cobb to Edwin Cook, dated 28d December, 1838, and then proved that Edwin Cook died intestate, and that the plaintiffs are his children and heirs-at-law, and that the defendants, as the heirs-at-law of one T. R. Elliott, were in the possession of the land at the commencement of this suit.

The defendants, to show title, produced and read a deed for the land from John Cobb, executed to one J. E. Herndon on the 2d February, 1831, and a deed from Herndon to T. R. Elliott on the 7th August, 1833; that Elliott, under and by virtue of his deed from Herndon, went into possession, and continued in possession until his death; and that the defendants, as his heirs, have had possession.

It was admitted that John Cobb was an infant when he executed the deed to Herndon, and was of full age when he executed the deed to Cook; and it was proved that Elliott knew when he purchased from Herndon that Cobb was an infant when he conveyed to Herndon.

The defendant, to prove that the deed to Herndon was binding on Cobb though an infant, offered evidence to prove that the land was in fact entered by one James Cobb, and paid for by him with his own money; that James Cobb was the father of John, who was at the time an infant of tender years, having no separate estate; the father having a wife, and three other infant children; that he was in indigent circumstances when he entered the land, and entered it in the name of his son to defraud his creditors; that Herndon was a creditor of the father, at the time he took the deed, but not at the time the land was entered; that the father sold the land to Herndon, in payment of the debt, and by his direction, John Cobb, the son, executed the deed. To this evidence the plaintiff objected as irrelevant and immaterial, and the Court sustained the objection, holding that the facts, if proved, would not validate the deed from him to Herndon, to which the defendant excepted.

The defendants also insisted that the deed from John Cobb to Edwin Cook was void by reason of the adverse possession of Elliott, at the time of such conveyance. But the Court charged the jury that, though a deed for land in the adverse possession of another was void, the facts of this case created an exception to the rule, and that an infant who had made a deed for lands during his minority might at majority disaffirm and annul it, by the execution of a deed to another; and such deed would pass a valid title to the grantee, notwithstanding the land was then in the adverse possession of the first grantee, and might recover the land in this form of action.

To all which they excepted, and which they now assign as error. 1

Ormond, J. The land in controversy was purchased of the United States by James Cobb, with his own money, but entered at the land office in the name of his son, John, then an infant of tender years, for the purpose of defrauding his creditors, he being then greatly embarrassed. This transaction is declared by the second section of the statute of frauds of this State to be utterly void, not only as to creditors, but as against subsequent purchasers, embracing the substance of the provisions of both the 13 & 27 Eliz.

In respect to the 27 Eliz., the English decisions are uniform,

Arguments omitted.

that a voluntary conveyance, although without fraud, will be set aside in favor of a subsequent purchaser for a valuable consideration, though he had full notice of the previous voluntary conveyance. Townsend v. Windam, 2 Ves. 10; Doe v. Rutledge, Cowp. 711; Fonblanque's Eq., Book I. c. 4, § 13; Roberts v. Anderson, 3 Johns. C. 376. In this case, however, the purchase by the father, in the name of the son, was fraudulent as well as voluntary; and, according to the established current of decisions, would be void as against subsequent as well as existing cred-See this question discussed by Ch. Kent, in Reade v. Livingston, 3 Johns. C. 500. So that whether the purchaser from the father, who was also a subsequent creditor, be considered as a creditor, or as a purchaser with notice of the previous voluntary conveyance to the son, the result under our statute of frauds is the same. We may therefore dismiss from the consideration of this question, all the arguments founded upon the relative situation of these parties, father and son.

Ordinarily, this does raise the presumption that the purchase was intended as advancement to the child, and it devolves on one asserting a resulting trust in the father, to establish it. But here, as the intention was to defraud creditors, as against them and subsequent purchasers from the father, the purchase in the name of the son is a void act, and the effect as to them is precisely the same as if the land had been entered in the name of the father instead of the son.

The only difficulty presented by the case arises from the fact, that as the fraudulent entry was made in the name of the son, the patent of the government, the highest evidence of the legal title, issued to the son, and this brings up the question of law, arising upon the two deeds executed by John Cobb, one whilst he was an infant, made at the instance of his father, under which the plaintiffs in error deduce their title, and the other after he came of full age, under which the defendant in error claims.

It may be conceded, that generally the deed of an infant, whether it be a deed of bargain and sale, operating by virtue of the statute of uses, or any other conveyance recognized by our law as a valid transfer of lands, would be disaffirmed, and rendered inefficacious by a subsequent conveyance made on his attaining majority. But this must certainly be confined to those cases where the infant has a valid title to the land so conveyed.

That was the case of Hoyle v. Stowe, 2 Dev. & B. 322, so earnestly pressed in argument. There an infant had, by deed of bargain and sale, conveyed his land during his minority, and subsequently, on his coming of age, by a similar deed conveyed it to another. The Court held the first deed to be voidable by the infant, on his attaining his majority, and that the making of the subsequent deed avoided the first.

It is perfectly obvious the case just cited has but little, if any, resemblance to this. Here the infant, though the legal title was cast upon him by the fraudulent conduct of his father, had no right to the land against a creditor or purchaser; when, therefore, he conveyed to the purchaser from his father, he merely parted with the naked title, and only did that which a Court of equity would have compelled him to do; and we are unable to perceive any reason for permitting him, by a disaffirmance of this act, to reinvest himself with the title, to be again deprived of it. We do not understand the law to be that every act of an infant, though it be by deed, is voidable at his election, on his attaining his majority.

It is an ancient maxim of the common law, that "generally, whatsoever an infant is bound to do by law, the same shall bind him, albeit he doth it without suit of law." Co. Litt. 172 a.; 1 Thos. Coke Litt. 205.

This point was so determined in the great case of Zouch v. Parsons, 3 Burr. 1801 (ante, p. 3). That was the case of an infant mortgagee, in whom the title was vested, who, upon the payment of the mortgage debt to the persons entitled to receive it, made a reconveyance of the land, and the Court held, that as this was an act which by law he could be compelled to perform, his voluntary performance of it, though during minority, should bind him, and he could not afterwards disaffirm it. We are aware that this celebrated judgment has been the subject of some critical animadversion, on account of some of the general positions advanced by Lord Mansfield. The true point of the case has never been seriously questioned, but is admitted to be law by the highest authority at the present day.

In Tucker v. Moreland, 10 Peters, 67 (post), the decision is approved. The Court say: "It was precisely such an act as the infant was bound to do, and would have been compelled to do by a Court of equity, as a trustee of the mortgagors, and

certainly it was to his interest to do it." So, in the case of Hoyle v. Stowe, previously cited from 2 D. & B. 822, whilst condemning some of the general propositions of Lord Mansfield as too sweeping, it is admitted by the Court, that the case was correctly decided.

So, also, Chancellor Kent, in summing up the doctrine upon this difficult and vexed question, says, "The doctrine of the case of Zouch v. Parsons has been recognized as law in this country, and is not now to be shaken." See also 1 Mason, 82; Whitney v. Dutch, 14 Mass. 467 (ante, p. 24); Bingham on Infancy, ch. II.

Upon this difficult question, what acts of an infant are absolutely void, voidable at his election, or binding on him, though made during infancy, we desire to be understood as confining ourselves to the precise case before us, which is that of an infant doing an act which it would have been his duty on arriving at full age to do, and which by law he could have been compelled to do.

Such an act, though performed during infancy, is binding on him, and cannot be afterwards disaffirmed.

Upon the other point of the case, we incline to the opinion that there is no difference between an infant and an adult as to the right to convey a title to land held adversely to the grantor.

That a conveyance by an infant, accompanied by a possession held adversely to him, though it may be avoided when he attains his majority, yet he cannot by his deed convey this title to another, so as to invest him with the right to sue in his own name for its recovery. But we waive the decision of this point, as the other is decisive of the case.

Let the judgment be reversed and the cause remanded.

ROACH v. QUICK et ux.

(9 Wend. 238. Supreme Court of New York, 1832.)

Infant Husband's liability for ante-nuptial Debts of Wife.

DEMURRER to plea. To a declaration for goods sold and delivered to the wife whilst sole, the defendants jointly pleaded that, at the time of the commencement of the suit, the husband was an infant within the age of twenty-one years, to wit, &c.; to which plea the plaintiffs demurred.

- M. T. Reynolds, for the plaintiffs. An infant is competent to enter into the marriage contract. By the intermarriage in this case, the husband became entitled to the personal property of the wife, and might reduce it to possession. Such being the necessary consequence of the marriage which he has capacity to contract, the law will not permit him to allege his infancy in fraud of others whom he has deprived of their legal rights. liability for the debts of his wife is an incident of the principal contract, and, being such, he cannot avoid answering for the debts of his wife. Atherly on Marriage Settlements, 21, 41; 1 Eden, 60, 75; 2 Brown's C. C. 545; 4 id. 506; 1 P. Wms. 469; 3 id. 409; Cas. Temp. Talb. 173; 1 Campb. 189; Esp. N. P. 161; Barnes, 95; Reeve's Domestic Relat. 234; Drury v. Drury, App. to McCarty v. Teller, 8 Wendell, 321, &c. If the plea of infancy be interposed, it should be pleaded as a personal privilege belonging to the husband alone, and not in bar of a recovery against the wife as well as the husband; for, on the death of the husband, there can be no question of the wife's liability for a debt contracted by her previous to her marriage.
- J. A. Spencer, for the defendants. Allowing that an infant, whose estate was benefited by his marriage, would be liable for the debts of his wife contracted by her while sole, it does not follow that a suit at law can be maintained against him. A bill in equity would probably be sustained in such a case, but not a suit at law, especially where there is no averment of the estate of the infant having been benefited. An infant is not liable even for necessaries provided the wife for the marriage, though for

necessaries for the wife subsequently furnished, he is chargeable. Strange, 168; Comyn's Dig. tit. "Enfant," B. 5.

The plaintiffs in this case should have sued the wife alone; and, if coverture had been pleaded, they might have replied the infancy of the husband. The answer to the suggestion that the husband alone ought to have pleaded infancy is, that, when husband and wife are sued jointly, they cannot plead separately. Comyn's Dig. tit. "Pleader," 2, A. 3.

By the Court. Nelson, J. As an incident to the marriage contract which an infant is competent to enter into, he is liable to pay the debts of his wife contracted by her before marriage.

Prior to her marriage the wife was responsible for such debts; and, unless the liability to pay them attached to the husband, her creditors would be remediless, as she cannot be sued alone, separate from her husband; and, if she could, a judgment against her would be fruitless, as all her estate is absolutely or qualifiedly vested in her husband. Reeve's Dom. Rel. 234; Barnes, 95. The plea in this case, therefore, is bad, and the plaintiffs are entitled to judgment; the defendants have leave to amend, on payment of costs.

MEDBURY v. WATROUS.

(7 Hill, 110. Supreme Court of New York, 1845.)

Rights and Remedies of Infants upon Avoidance of their Contracts.

On error from the Oneida Common Pleas. Watrous sued Medbury before a justice of the peace, and declared for work, labor, and services. On the trial it appeared that the plaintiff had worked for the defendant, and that the value of the work was seventy dollars and twenty cents.

The defendant proved that the work was done in part performance of a covenant, by which he agreed to sell and convey to the plaintiff a certain house and lot for six hundred dollars, one hundred and fifty dollars of which was to be paid in work. The covenant was entered into and the work performed in 1842, while the plaintiff was an infant, and this suit was commenced in

1843, after he became of age. The justice rendered judgment against the plaintiff, which was reversed by the Common Pleas on certiorari, and the defendant brought error.

T. H. Flandrau, for the plaintiff in error, cited McCoy v. Huffman, 8 Cowen, 84.

G. F. Fowler, for the defendant in error.

By the Court. Beardsley, J. The plaintiff (Watrous), while a minor, performed work and labor for the defendant to the amount of more than seventy dollars. The work was done in part performance of a contract, by which the defendant agreed to sell and convey to the plaintiff a certain house and lot for six hundred dollars, to be paid in labor and money.

Upon this contract the plaintiff did work to the amount stated, but it does not appear that he took possession of the house or lot, or in any manner occupied or used either. On arriving at mature age he abandoned the contract, and brought this action to recover compensation for the work and labor. It must be admitted that the case of McCoy v. Huffman, 8 Cowen, 84, is directly in point to show that the plaintiff cannot recover. In that case the infant made a contract for the purchase of land, upon which he paid money and performed labor; but he disaffirmed the contract when he became of age, without having taken possession of the land, and brought his action to recover the money he had paid, and a compensation for his services. The Court held, however, that he could not recover, that "although the executory contracts of an infant are voidable by him at his election, yet, if he pay money on a contract made by him, though he avoid the contract on arriving at mature age, he cannot recover the money back."

If the principle of McCoy v. Huffman is law, it must control the present case.

That case was professedly decided on the authority of Holmes v. Blogg, 8 Taunt. 508, and a dictum of Lord Mansfield, which, in its terms, is quite too general, in my estimation, to be relied upon as a satisfactory authority for any purpose. Chief Justice Savage seems to have regarded the principle of McCoy v. Huffman as "expressly adjudged" in Holmes v. Blogg; but he certainly overlooked an important fact in which these cases differ. The case of Holmes v. Blogg was this: Holmes, an infant, was a partner with one Taylor; and, in order to carry on their busi-

ness, they took a lease of certain premises from the defendant Blogg. On the execution of the lease, Holmes paid down one hundred and fifty-seven pounds, and the copartners took possession of the premises demised, which they continued to occupy until Holmes became of age, when he dissolved the copartnership, quit the premises, and brought his action to recover the sum he had paid to his landlord for the lease. And this fact, viz., that the infant had occupied and used the premises for which the money was paid, distinguishes that case from McCoy v. Huffman. Chief Justice GIBBS, in delivering the opinion of the Court, said: "What is the point here? That an infant having paid money on a valuable consideration, and having partially enjoyed the consideration, seeks to recover it back." This was, indeed, the turning point in the cause, and so it was understood by the same Court in Corpe v. Overton (10 Bing. 252). In that case, Corpe, the plaintiff, while a minor, agreed to enter into partnership with the defendant, and to execute a partnership deed when he became of age, with the usual covenants.

By way of securing the due fulfilment of this agreement, one hundred pounds were paid down by the plaintiff, to be forfeited if he failed to perform. The arrangement was not completed; and the infant rescinded the contract, and brought his action to recover the money paid. On the trial, the jury found that the plaintiff had paid the one hundred pounds on a fraudulent representation, and gave their verdict in his favor for that sum. A motion for a new trial was made on the ground that the finding of fraud was contrary to the evidence; and that, if the transaction was bona fide, the plaintiff could not recover, for which Holmes v. Blogg was cited. TINDAL, C. J., said: "I think we may arrive at a right determination of this case without impeaching the decision in Holmes v. Blogg, because the facts of the two cases are manifestly distinguishable. In Holmes v. Blogg, the infant had paid 1571. as his share of the consideration for a lease of premises, in which he and his partner carried on the business of shoemaking. They occupied the premises from March till June, when the infant coming of age dissolved the partnership, relinquished the business, and sought to recover back the money he had paid the lessor for his lease." "The ground, therefore, of the judgment in Holmes v. Blogg was, that the infant had received something of value for the money he had paid, and that he could not put the defendant in the same position as before. In the present case, the plaintiff has paid to Overton 100*l*., for which he has not received the slightest consideration." "As it is plain, therefore, that the infant had a right to rescind the contract, the only point we have to look to with reference to Holmes v. Blogg is, whether he had derived any intermediate advantage from it. Now the partnership was not to be entered into till January, 1833; and in the mean while, the infant had derived no advantage whatever from the contract. The case of Holmes v. Blogg fails on that ground as an authority in point." The other judges concurred, and expressed themselves to the like effect as to the case of Holmes v. Blogg.

I think I am, therefore, fully justified in the conclusion that the decision in McCoy v. Huffman is not sustained by the case of Holmes v. Blogg, and that it is in direct conflict with Corpe v. Overton. The latter, it seems to me, is sound in principle, and in harmony with the general rules of law relating to the rights of infants.

Where an infant executes a conveyance of his real estate, he may avoid it on coming of age, and recover by action what he has thus conveyed. Bool v. Mix, 17 Wend. 129 to 133; Tucker v. Moreland, 10 Peters, 58. So where an infant sells his personal property and delivers it to the purchaser, he may, notwithstanding, avoid the sale, and bring an action for the thing sold. Roof v. Stafford, 7 Cowen, 179; s. c. 9 id. 626; Fonda v. Van Horne, 15 Wend. 635.

And where work and labor have been done on a contract, which the infant afterward avoids, as he has a right to do, why should he not recover a reasonable compensation for his services? Bosanquer, J., in Corpe v. Overton said: "It is a general rule, that, upon an entire failure of consideration, a party is entitled to recover back money paid, and it cannot be said that in this respect an infant is in a worse situation than others. Here the infant has derived no benefit whatever from the contract, the consideration of which has wholly failed. It has been urged, indeed, that it failed by the act of the plaintiff himself; but, if the law allows him to rescind a contract from which he has derived no benefit, he must be allowed to rescind it to all intents and purposes, and, if so, for the purpose of recovering money

paid without consideration." These views are strictly applicable to the present case, and in my opinion are correct in principle. "If an infant," says Chancellor Kenz, "pays money on his contract, and enjoys the benefit of it, and then avoids it when he comes of age, he cannot recover back the consideration paid." 1 2 Kent's Comm. 240, 5th ed.; see also Chitty on Cont. 149, 579, and note (1) (5th Am. ed.); Austen v. Gervas, Hob. 77; Vent v. Osgood, 19 Pick. 572; Moses v. Stevens, 2 id. 332; Thomas v. Dike, 11 Vt. 273; Baker v. Lovett, 6 Mass. 78; Willis v. Twambly, 13 id. 204; Roof v. Stafford, 7 Cowen, 179; s. c. 9 id. 626; Fonda v. Van Horne, 15 Wend. 631; Millard v. Hewlett, 19 id. 301; Macpherson on Inf. 488. But the rule is otherwise where the infant has not derived any benefit from his contract; for then he may avoid it, and recover back what he has paid.

There is one English case, and I know of but one, in conformity with McCoy v. Huffman, and that is Wilson v. Kearse, Peake's Add. Cas. 196.

It is thus stated and commented on by Mr. Macpherson in his valuable treatise on the law relating to infants. "The plaintiff, being an infant, contracted with the defendant to purchase the goodwill and stock of a public-house, and made a deposit. Being afterward called upon to complete his contract, he refused, and brought an action to recover his deposit. Kenyon is stated to have been of opinion, that, though an infant was not compellable to complete a contract, yet, when he had paid money under it, he could not recover it back, unless he could show that fraud had been practised on him. This case (unless there had been some enjoyment under the contract) must be considered as overruled by Corpe v. Overton, in which the Court lay down the law quite independently of fraud." Macpherson on Inf. 409, note (b). The case of McCoy v. Huffman was decided in 1827. It was followed by the Superior Court of New Hampshire in 1831, Weeks v. Leighton, 5 N. Hamp. 343; and by the Supreme Court of Indiana in 1837. Harney v. Owen, If these cases have failed to convince me that 4 Blackf. 337. they were based on a correct principle, they certainly have led to great caution in coming to an opposite result. In Holmes v. Blogg, it was not shown what had been the value of the use of the premises demised, while the infant remained in possession.

If that was less than the sum paid by him, it may well be that he ought to have recovered the difference. When such a question shall arise the case of Vent v. Osgood, 19 Pick. 572, will deserve especial consideration. I think the judgment of the Common Pleas should be affirmed.

Judgment affirmed.

WHITMARSH v. HALL.

(3 Denio, 375. Supreme Court of New York, 1846.)

Rights and Remedies of Infants upon the Avoidance of their Contracts.

ERROR to the Onondaga Common Pleas. Hall, an infant, by his next friend, sued L. and J. Whitmarsh for work and labor.

It was proved that the plaintiff had worked for the defendants half a month under a contract to labor for them for a certain longer period of time, and had left without cause.

After the plaintiff had proved the value of the labor, the defendants proposed to ask a witness what the plaintiff's services were worth, taking into consideration the damages they had sustained in consequence of his not fulfilling his agreement.

The justice refused to receive this evidence, on the ground that the plaintiff was not, on account of his infancy, bound by his contract; and gave judgment for the plaintiff, which the Common Pleas affirmed on certiorari.

- R. H. Duell, for the plaintiffs in error.
- D. Gott, for the defendant in error.

By the Court. Jewett, J. The evidence offered by the defendants, to show the value of the plaintiff's services, taking into consideration such damages as they had sustained in consequence of his putting an end to the contract by voluntarily refusing to fulfil it on his part, was properly rejected by the justice.

This contract was voidable by the plaintiff by reason of his infancy, according to the general rule of law, that the contracts of infants, with certain exceptions which do not embrace this case, may be avoided by them either before or after they arrive at full age. 2 Kent's Com. 237 (5th ed.).

There is no case where it has been held that an executory contract, by an infant, not being for necessaries, is obligatory upon him. The plaintiff here has put an end to, and avoided his contract with the defendants, by voluntarily leaving their service and bringing this suit to recover the value of his services. It is insisted on the part of the defendants that the justice erred in rejecting the evidence offered by them, on the ground that, although the plaintiff was an infant and had a right to avoid his contract and recover the value of his services, yet that the defendants were entitled, if they had sustained an injury by such avoidance, to have a proper allowance therefor made against such value.

In other words, it is claimed that the defendants are entitled, as a set-off against the value of the plaintiff's services, such sum as is equal to the amount of the injury sustained by them, by the avoidance of the contract by the plaintiff, which in effect would charge the infant with the performance of his contract, or with damages for its violation. The proposition is not sustained by any elementary principle known to the law, and I do not find that it has been recognized by any adjudged case, unless by that of Moses v. Stevens, 2 Pick. 332. In that case, the plaintiff, an infant, had made a special agreement to labor for the defendant a certain time for certain wages, and, before the time expired, left his service voluntarily without cause. It was held that he might recover on a quantum meruit for the services performed, and, if his employer was injured by the sudden termination of the contract without notice, a deduction should be made on that account.

The learned judge, in delivering the opinion of the Court, said: "We think, the special contract being avoided, an indebitatus assumpsit, upon a quantum meruit lies, as it would if no contract had been made; and no injustice will be done, because the jury will give no more than, under all circumstances, the services were worth, making any allowance for any disappointment amounting to an injury which the defendant in such case would sustain by the avoidance of the contract."

With great respect, I am unable to yield my assent to the soundness of the qualification annexed to the proposition.

I think that the infant plaintiff, in such an action, is entitled, by well-settled principles of law, to recover such sum for his ser-

vices as he would be entitled to if there had been no express contract made. A recovery is allowed upon the assumption that there is no express contract at all.

The judgment under review is therefore correct.

Judgment affirmed.

Holmes v. Blogg.

(8 Taunt. 508; s. c. 2 Moore, 552. Court of Common Pleas, 1818.)

Rights and Remedies of Infants upon Avoidance of their Contracts.

Assumpsite by the plaintiff to recover 157l. 10s. paid by him during his infancy to the defendant. Plea, general issue. At the trial before Burrough, J., at the London sittings after last Michaelmas Term, in addition to the facts stated when this case was before the Court in Hilary term last, it appeared that when the arrangement with Taylor was entered into by the defendant, the plaintiff was not in business, having quitted it when he became of age, and that, in a subsequent conversation between the plaintiff and Taylor respecting the lease, the former declined having anything to do with it; that the plaintiff had never slept in the house after he became of age, and that his name was soon afterwards taken off the door. For the defendant it was contended that, under these circumstances, the plaintiff could not recover.

BURROUGH, J., was of the opinion that the action was well brought, but reserved the point. The jury found for the plaintiff; and, in Hilary term last,

Copley, Serjt., obtained a rule nisi to set aside this verdict, on the ground that there had been no disaffirmance of the contract; and that the sum sought to be recovered, having been paid on the joint account of the plaintiff and Taylor, this action by the plaintiff could not be maintained.

Best, Serjt., in the last term showed cause, and made two points: first, that, if disaffirmance were necessary, the plaintiff, upon coming of age, had disaffirmed the contract. Second, that disaffirmance was not necessary; and that infants were not bound

by any contract unless there were affirmance by them after coming to full age. In addition to the cases cited in favor of the plaintiff on the former discussion, the following authorities were relied on in support of these points. Com. Dig. tit. "Enfant," C. 2; Smith v. Low, 1 Atk. 489; Nightingale v. Earl Ferrars, 3 Peere Wms. 206; Lit. sect. 258.

Copley, in support of the rule, argued on the point of the plaintiff's liability for rent to the same effect, in substance, as he did in showing cause on the former occasion, referring in addition to Com. Dig. tit. "Enfant.," C. 3, and urged that, as the payment made was a partnership payment, the plaintiff's remedy was against Taylor for contribution, but that he could not recover the money so paid in the present action. Cur. adv. vult.

And now

GIBBS, C. J., delivered the judgment of the Court.

This was an action by Holmes against Blogg for money had and received; and the ground on which the plaintiff sought to recover is founded on the following facts. Holmes, an infant, together with Taylor, had agreed with the defendant to take the lease of his house, and to pay to him a certain sum of money for that lease. Part of the money was paid down, and security was given for the residue.

In point of fact, the money paid was the money of Holmes, at that time an infant. The infant avoided the lease when he came of age, as he had a right to do; and, having avoided the lease, he brought this action for the money paid to the defendant on the ground that, the consideration having failed, he was entitled to recover it.

There has been a good deal of argument on the subject of this avoidance, and, indeed, it has been treated as the main question; but another question arises; namely, whether, supposing the lease to have been avoided, the plaintiff could recover the money which he has paid for it during his infancy.

I confess this action is quite new to me, and I thought, on principle, that it could not be maintained.

I thought, too, that there was much in my brother Copley's argument, that the money paid could not be taken to be the money of the infant alone, but that it must be taken to be joint money of the infant and Taylor; and that, if it was paid as their joint

money, it would be money advanced by Holmes in the first instance to the partnership of Holmes & Taylor, and then paid as partnership money by them to Blogg. But I think further, that, supposing this money to be the sole property of the infant, he cannot recover.

He may, it is true, avoid the lease; he may escape the burthen of the rent, and avoid the covenants; but that is all he can do. He cannot, by putting an end to the lease, recover back any consideration which he has paid for it: the law does not enable him to do that. I cannot find this decided, for I cannot find that any such action as this has ever been brought; but Lord Mansfield has incidentally said that such an action cannot be brought. In the famous case of Drury v. Drury, 2 Eden, 39, one of the questions was whether an infant could, by contract, bar her dower. Lord Northington thought that statute applied only to adults; and the marriage of Lady Drury with the Earl of Buckinghamshire took place on his opinion; but the case afterwards came before the House of Lords upon appeal, under the name of The Earl of Buckinghamshire v. Drury, Wilmot's Notes of Opinions and Judgments, 177; s. c. 8 Brown's Parl. Cas. 492 (2d ed.); s. o. 2 Eden, 60, when the decree of Lord NORTHINGTON as to this point was reversed. Lord Mansfield there said, in delivering his opinion, "If an infant pays money with his own hand, without a valuable consideration for it, he cannot get it back again." 2 Eden, 72.

What is the point here? That an infant, having paid money on a valuable consideration, and having partially enjoyed the consideration, seeks to receive it back.

But the authority does not altogether stop here. In Lord Chief Justice Wilmot's Notes of Opinions and Judgments, 226, it appears that Lord Hardwicke and Lord Mansfield were of opinion with the majority of the judges; in which majority the learned author, then Mr. Justice Wilmot, was. His note of Lord Mansfield's judgment on this point is in these words; "If an infant pays money with his own hand, without a valuable consideration, he cannot get it back again." Wilmot's Notes, 226 n. So that Lord Chief Justice Wilmot had himself taken a note of this declaration of Lord Mansfield, and laid it up among his memoranda, without any expression of disapprobation. He must, therefore, be taken to have adopted it. We,

therefore, think that this action cannot be maintained, upon the ground that the infant, having paid the money with his own hand, cannot recover it back again. The other ground taken by my brother Copley, namely, that this was the money of the partnership, my brother Burrough tells me, was not taken at nisi prius. We do not, therefore, decide on that ground.

Rule absolute for a nonsuit.

Dallas, J., who was absent on account of illness, concurred in this judgment. Ex relatione Gibbs, C. J.

CORPE v. OVERTON.

(10 Bing. 252. Court of Common Pleas, 1833.)

Rights and Remedies of Infants upon Avoidance of their Contracts.

THE plaintiff, while yet a minor, in October, 1832, signed a written agreement to enter into partnership with the defendant, a tailor; to pay him 1,000l. for a share of the business; and on the 1st of January, 1833, to execute partnership deed with the usual covenants; "and as a deposit for the due fulfilment of the same on the part of the said A. R. Corpe, the sum of 1001. is now paid to the said W. Overton as per receipt, on the condition of the same sum of 100l. being deducted from the amount of the said intended purchase, or otherwise in default of the said intended purchase not being duly completed by the said A. R. Corpe according to the aforesaid terms, the said sum of 100%. shall be forfeited to the said W. Overton; and he, the said W. Overton, shall be subject to no claim or demand whatever from any person or persons for the sum of 100l., or any other amount unless any disagreement should arise between the creditors of the said W. Overton and himself, so as to prevent the fulfilment of the said intended partnership; then, and in that case only, the said A. R. Corpe shall not be actually held liable to forfeit the said sum of 1001.; but such point to be decided by two arbitrators, one chosen by each said party."

The plaintiff, after depositing the 100l., as recited in the above agreement, discovered that he had been imposed upon by

exaggerated representations as to the value of the defendant's business; he, therefore, rescinded the contract as soon as he came of age; refused to execute the partnership deed, and brought an action against the defendant for 100l. had and received by him to the plaintiff's use.

At the trial before ALDERSON, J., the jury found that the plaintiff had paid the deposit on a fraudulent representation in the defendant's balance sheet, and gave their verdict for the plaintiff, damages 100l.

Goulburn, Serjt., obtained a rule nisi to set aside this verdict and to enter a nonsuit, or to proceed to a new trial, on the ground that the finding of fraud was contrary to the evidence; and that, if the transaction was bona fide, the defendant was entitled to retain the money.

In Holmes v. Blogg, 8 Taunt. 508 [next case ante], it was expressly decided that if an infant pay money with his own hand, he cannot get it back again, although it were paid without a valuable consideration.

Coleridge, Serjt., showed cause.

Even if the transaction were bona fide, the defendant has no right to retain the money. First, because it was paid by an infant in pursuance of an agreement to enter into trade; and an infant not being competent to incur the liabilities of trade, the plaintiff had a right to avoid such a contract. When the contract was avoided, the money was held by the defendant without consideration, and might be recovered in assumpsit for money had and received. Austen v. Gervas, Hob. 77; Perk. sect. 12, "Grants;" Zouch v. Parsons, 3 Burr. 1794 [ante, p. 3]; Vin. Abr. "Infant" (D). Secondly, because the payment made by the plaintiff is in the nature of a penalty for non-performance of a contract, and an infant is not liable to a penalty. Fisher v. Mowbry, 8 East, 330. In Holmes v. Blogg, Gibbs, C. J., dropped certain general expressions which may appear adverse to the plaintiff's claim in this action; but those expressions must be taken with reference to the facts then before the Court. The infant sought to recover money which he had paid as a premium upon a lease under which he had for some months enjoyed certain premises demised to him and another; he had, therefore, received a consideration for his money, and it would have been impossible to place the defendant in the same situation as before

the contract. Here the plaintiff has received no consideration, and the defendant has sustained no injury.

Goulburn, in support of his rule, relied upon Holmes v. Blogg. TINDAL, C. J. I think we may arrive at a right determination of this case without impeaching the decision in Holmes v. Blogg, because the facts of the two cases are manifestly distinguishable. In Holmes v. Blogg the infant had paid 1571, as his share of the consideration for a lease of premises in which he and his partner carried on the business of shoemaking. occupied the premises from March till June, when the infant, coming of age, dissolved the partnership, relinquished the business, and sought to recover back the money he had paid the lessor for his lease. In that case, therefore, the sum of money sought to be recovered back, as having been paid without consideration, appeared to have been paid for something available; that is, for three months' enjoyment of the premises let to him and his partner; and the plaintiff could not put the lessor again into the same situation. And though several expressions are dropped by the chief justice in delivering his judgment, yet, when he comes to apply them to the subject before the Court, he gives them a less extensive latitude. After referring to the opinion of Lord Mansfield, he goes on, "What is the point here? That an infant, having paid money on a valuable consideration, and having partially enjoyed the consideration, seeks to receive it back." The ground, therefore, of the judgment in Holmes v. Blogg was, that the infant had received something of value for the money he had paid, and that he could not put the defendant in the same position as before. In the present case, the plaintiff has paid to Overton 100%, for which he has not received the slightest consideration.

The money was paid, either with a view to a present or a future partnership. I understand it as having been paid with a view to a future partnership. In order to ensure performance of the contract, the infant paid down 100*l*., which he was to forfeit in case of refusal to proceed. When he came of age, he declared that he had rescinded the contract; and it seems to me that he had a right to do so. From Hill and Whittington's Case, Dy. 104, note, to Whywall v. Champion, Str. 1083, it has been always held, that an infant cannot incur liability by carrying on trade. If he cannot trade, a contract to enter into trade is

one which he may avoid when he comes of age. Now, when he rescinds such a contract, he has a right to rescind the whole of it; and one of the terms of the contract in question being that he should pay down 100l., if we were to determine that he has a right to rescind the contract and yet not to recover the money paid in advance, the protection which the law extends to an infant might be altogether eluded by allowing the other party to retain money so paid in advance. As it is plain, therefore, that the infant had a right to rescind the contract, the only point we have to look to with reference to Holmes v. Blogg, is whether he had derived any intermediate advantage from it. Now the partnership was not to be entered into till January, 1833; and, in the mean while, the infant had derived no advantage whatever from the contract. The case of Holmes v. Blogg fails on that ground as an authority in point.

But there is another ground on which the plaintiff is entitled to recover in this action. According to the old law, as laid down in Co. Lit. 172 a, an infant is not bound by any forfeiture annexed to a contract, and his obligation with a penalty, even for necessaries, is absolutely void. What is this payment, in effect, but a sum handed over by way of penalty? The principle which exempts an infant from a penalty must extend as well to a penalty enforced by handing over money in advance, as to penalties accruing on the breach of a condition; and the rule which has been obtained in this case must, therefore, be discharged.

GASELEE, J. I consider the present case as clearly distinguishable from Holmes v. Blogg, otherwise I should be slow to decide that the rule ought to be discharged.

Bosanquer, J. I am also of opinion that this rule ought to be discharged; but we are far from impeaching the judgment of the Court in Holmes v. Blogg, as applicable to the facts of that case. There the infant had paid a sum of money as part of the consideration for a lease of premises in which he carried on business with a partner. The premises were, in fact, occupied, for twelve weeks; but, if they had been occupied for any other period, there would have been no difference in principle, and the plaintiff could not recover back sums from the outlay of which he had derived an advantage.

There is no reason, therefore, for finding fault with that decision. It is, however, a general rule, that, upon an entire failure

of consideration, a party is entitled to recover back money paid, and it cannot be said that in this respect an infant is in a worse situation than others. Here, the infant has derived no benefit whatever from the contract, the consideration of which has wholly failed.

It has been urged, indeed, that it failed by the act of the plaintiff himself; but if the law allows him to rescind a contract from which he has derived no benefit, he must be allowed to rescind it to all intents and purposes, and, if so, for the purpose of recovering money paid without consideration. It is true that there are strong expressions in Holmes v. Blogg; and, if they are to be taken ad literam, they may seem to contravene the opinion we are now pronouncing. We must look, however, not to the expressions alone, but to the facts to which they were applied, for general expressions must often be qualified by reference to the circumstances which have called them forth; the benefit received by the infant for a certain period afforded a solid ground for the decision of that case, and no such ground exists in the present instance. The 100l. paid here was in the nature of a deposit; money paid on a deposit may generally be recovered back where the contract goes off; and here the contract was deposited before the infant derived any benefit from it. If the payment is to be considered in the light of a forfeiture or penalty, the plaintiff is still more clearly entitled to recover it under the general law which exempts him from any such liability.

Alderson, J. I am of the same opinion. The parties agree, in 1832, to enter into partnership in the following January, and 100l. was to be paid down, to be forfeited if the plaintiff should decline to perform his contract. Before the contract is performed, one of the parties revokes it, and remits the other to the same situation as if the contract had never been made.

There is no ground, therefore, on which he can claim to retain money for the purpose of enforcing the execution of a contract which the law says an infant shall not enter into. In this, the case is clearly distinguishable from Holmes v. Blogg. Here the infant has had no enjoyment of any advantage from the contract; in Holmes v. Blogg he had enjoyment, for a period, of premises demised to him; and, so far, was in the same situation as if he had paid for expensive clothes or other articles not necessary, and after wearing them, had brought an action for the

price. In such an action he could not be allowed to recover, although the tradesman, if unpaid, could not have enforced payment.

Rule discharged.

PRICE v. FURMAN.

(27 Vt. 268. Supreme Court of Vermont, 1855.)

Right and Effect of Avoidance.

Trover for a harness and a five-dollar bill. Plea, the general issue; trial by the Court, March Term, 1854,— PIERPONT, Judge, presiding. The plaintiff's testimony tended to prove that, about the 1st of September, 1851, he let the defendant have a harness and a five-dollar bill, which at the trial could not be described or identified, in exchange for a mare of the defendant's; that after a few weeks he returned the mare to the defendant, and demanded the harness and five dollars; that the defendant refused to deliver either, or to take back the mare, and that thereupon he turned the mare loose into the highway and left her, and soon afterwards commenced this suit; and that at that time, and also at the time of the trial, he was a minor. The defendant offered to prove that said mare was worth much more than said harness and five dollars, and that said mare was more beneficial to the plaintiff than the property he exchanged for her, and that said trade was in every respect fair, and to the great advantage of the plaintiff; that the plaintiff took said mare home to his mother's and worked her upon the farm, and drove her very hard for seven or eight weeks; and that when he returned her and demanded said harness and five dollars, said mare was worth less than half what she was when he received her; that she was very much reduced in flesh and otherwise injured by his treatment of her, and that, during said seven or eight weeks, the plaintiff frequently expressed himself satisfied with said trade. The Court excluded this evidence, and rendered judgment for the plaintiff to recover the value of the harness only. Exceptions by the defendant.

A. A. Nicholson, for the defendant. Edgerton and Allen, for the plaintiff. The opinion of the Court was delivered by —

ISHAM, J. The plaintiff has brought this action of trover to recover the value of a one-horse harness and five dollars in current money, which was given by him, then and still a minor, to the defendant in exchange for a mare. The plaintiff has offered to return the property he received, and has disaffirmed the contract, and has now brought this action to recover the value of the property which he gave on that exchange. The County Court allowed a recovery for the harness, but disallowed the five dollars in money. No exception having been taken by the plaintiff for that matter, the case now rests upon the right of the plaintiff to recover for the harness. As a general rule, all contracts of an infant, whether executed or executory, if not for necessaries, may be avoided by him unless he has ratified them after arriving at full age. Abell v. Warren, 4 Vt. 149.

The purchase of this horse was not a contract for necessaries; and it is one of that character which may be avoided by the in-It is immaterial whether the contract was advantageous for the plaintiff or not; it is his privilege to rescind it, and in that event it cannot be enforced. In cases of sales of land, it has been held, that an infant may enter under age, and hold and take the profits, but cannot conclusively avoid a conveyance, till he is of age. Stafford v. Roof, 9 Cowen, 626; Bool v. Mix, 17 Wend. 120. But contracts relating to personal property may be avoided under age and immediately, and in many, if not most cases, must be exercised during that period, in order to afford the infant that protection which it has been the policy of the law to create in his behalf. Stafford v. Roof, 9 Cowen, 626; Shipman v. Horton, 17 Conn. 481; Willis v. Twambly, 13 Mass. "This right of the infant to 204; 1 Amer. Lead. Cas. 259. avoid his contracts is an absolute and paramount right, superior to all equities of other persons, and may, therefore, be exercised against bona fide purchasers from the grantee, and that avoidance may be by any act clearly demonstrating a renunciation of the contract." Vent v. Osgood, 19 Pick. 572; 1 Amer. Lead. Cas. 259.

The consequences resulting from an avoidance of such a contract depend upon the circumstances of each particular case. On executory contracts, if the action is brought against the infant, he may interpose his non-age as a defence, and no recovery can

'be had against him, wherher the action be in assumpsit, or in case in form ex delicto. Morrill v. Aden, 19 Vt. 505; Jennings v. Rundall, 8 Term, 335. But if the contract is executed, and the action is brought by the infant to recover back the amount which he has paid, or the property which he has delivered, more difficulties arise. In the case of Holmes v. Blogg, 8 Taunt. 508, it was held, that where an infant had paid money as a premium for a lease, and enjoyed the same for a short period during his infancy, but avoided it after he became of age, he could not recover the sum so paid. Upon the authority of that case were decided the cases of M'Coy v. Huffman, 8 Cow. 84, and Weeks v. Leighton, 5 N. H. 343. But in Medbury v. Watrous, 7 Hill, 110, the case of M'Coy v. Huffman is expressly overruled; and the case of Holmes v. Blogg has been virtually overruled by the case of Corpe v. Overton, 10 Bing. 252. The doctrine is now well settled by the authorities, that, when a contract is avoided by an infant, he may recover back whatever he has paid or delivered on it. If services have been rendered he may recover, in quantum meruit, the value that his services have been upon the whole state of the case; if money or property has been paid or delivered, it can equally be recovered. Moses v. Stevens, 2 Pick. 332; Vent v. Osgood, 19 Pick. 572; Voorhees v. Wait, 3 Green, 343; Judkins v. Walker, 17 Maine, 38; Whitsmarsh v. Hall, 3 Denio, 373. But in all such cases, as a general rule, if the infant rescinds the contract and avoids his liability upon it, he must surrender the consideration, and return what he has received; for it would be unjust to permit him to recover back what he has paid or delivered, and at the same time permit him to retain the fruits of the contract which he has received. & Co. v. Pike, 14 Vt. 405; Walker v. Ferrin, 4 Vt. 523; Weed v. Beebe, 21 Vt. 495; Hillyer v. Bennett, 3 Edwards, Ch. 222; Kitchen v. Lee, 11 Paige, 107. This rule, however, is subject to an important qualification. A distinction is to be observed between the case of an infant in possession of such property after age, and when he has lost, sold, or destroyed the property during his minority. In the former case, if he has put the property out of his power, he has ratified the contract, and rendered it obligatory upon him; in the latter case the property is to be restored if it be in his possession and control. If the property is not in his hands, nor under his control, that obligation

ceases. To say that an infant cannot recover back his property which he has parted with under such circumstances, because by his indiscretion he has spent, consumed, or injured that which he received, would be making his want of discretion the means of binding him to all his improvident contracts, and deprive him of that protection which the law designed to secure to him.

The authorities, we think, fully sustain this qualification of that rule. Fitts v. Hall, 9 N. H. 441; Robbins v. Eaton, 10 N. H. 562; Boody v. McKenney, 23 Maine, 517, 525, 526; 1 Amer. Lead. Cas. 260, in notes by Messrs. Hare & Wallace. On these general principles the plaintiff can sustain this action to recover the value of this harness, as there was an offer to return the property which was in his possession and under his control; and this right is unaffected by the circumstance, that the mare was not in as good condition, or of the value, that it was when received by him.

The evidence, therefore, showing that the mare had depreciated in value while in the plaintiff's hands, was inadmissible for the purpose of defeating a recovery in this action, or for the purpose of reducing the damages. The infant is no more liable for the use, than he would be for the purchase, of the mare; particularly as there is nothing in the case showing that he was personally benefited by it, or that in any point of view it could be deemed necessaries for which he would be liable. The judgment of the County Court is affirmed.

TUCKER et al. v. MORELAND.

(10 Peters, 58. Supreme Court of the United States, 1836.)

What amounts to a Disaffirmance of an Infant's Deed. — Acts void and voidable. — Voidable Acts, how confirmed and avoided. — Effect of Fraud.

Mr. Justice Story delivered the opinion of the Court. This is a writ of error to the Circuit Court for the county of Washington, and District of Columbia. The original action was an ejectment

¹ The facts of the case and requests in the opinion of the Court, the reto charge, &c., sufficiently appearing porter's statement is omitted.

brought by the plaintiff in error against the defendant in error; and both parties claimed title under Richard N. Barry. At the trial of the cause upon the general issue, it was admitted, that Richard N. Barry, being seised in fee of the premises sued for, on the first day of December, 1831, executed a deed thereof to Richard Wallach. The deed, after reciting that Barry and one Bing were indebted to Tucker and Thompson in the sum of three thousand two hundred and thirty-eight dollars, for which they had given their promissory note, payable in six months after date, to secure which the conveyance was to be made, conveyed the premises to Wallach, in trust to sell the same in case the debt should remain unpaid ten days after the first day of December then next. The same were accordingly sold by Wallach, for default of payment of the note, on the 23d of February, 1833, and were bought at the sale by Tucker and Thompson, who received a deed of the same on the 7th of March of the same year. It was admitted that, after the execution of the deed of Barry to Wallach, the former continued in possession of the premises until the 8th of February, 1833, when he executed a deed, including the same and other parcels of land, to his mother, Eliza G. Moreland, the defendant, in consideration (as recited in the deed) of the sum of one thousand one hundred and thirty-eight dollars and sixty-one cents, which he owed his mother; for the recovery of which she had instituted a suit against him, and of other sums advanced to him, a particular account of which had not been kept, and of the further sum of five dollars. At the time of the sale of Wallach, the defendant gave public notice of her title to the premises, and she publicly claimed the same as her absolute right. The defendant further gave evidence at the trial to prove that at the time of the execution of the deed by Barry to Wallach, he, Barry, was an infant under twenty-one years of age, and at the time of the execution of the deed to the defendant, he was of the full age of twenty-one years. Upon this state of the evidence the counsel for the defendant prayed the Court to instruct the jury, that if, upon the whole evidence given as aforesaid to the jury, they should believe the facts to be as stated as aforesaid; then the deed from the said Wallach to the plaintiffs did not convey to the plaintiffs any title which would enable them to sustain the action. This instruction the Court gave; and this constitutes the exception now relied on by the plaintiff in error,

in his first bill of exceptions. Some criticism has been made upon the language in which this instruction is couched. But, in substance, it raises the question which has been so fully argued at the bar, as to the validity of the plaintiff's title to recover, if Barry was an infant at the time of the execution of his deed to Wallach. If that deed was originally void, by reason of Barry's infancy, then the plaintiff, who must recover upon the strength of his own title, fails in that title. If, on the other hand, that deed was voidable only, and not void, and yet it has been avoided by the subsequent conveyance to the defendant by Barry, then the same conclusion follows.

And these, accordingly, are the considerations which are presented under the present instruction. In regard to the point whether the deed of lands by an infant is void or voidable at the common law, no inconsiderable diversity of opinion is to be found in the authorities. That some deeds or instruments under seal of an infant are void, and others voidable, and others valid and absolutely obligatory, is not doubted. Thus a single bill under seal given by an infant for necessaries is absolutely binding upon him; a bond with a penalty for necessaries is void, as apparently to his prejudice; and a lease reserving rent is voidable only.¹

The difficulty is in ascertaining the true principle upon which these distinctions depend. Lord Mansfield, in Zouch v. Parsons, 3 Burr. 1804, said, that it was not settled what is the true ground upon which an infant's deed is voidable only; whether the solemnity of the instrument is sufficient, or it depends upon the semblance of benefit from the matter of the deed upon the face of it. Lord Mansfield, upon a full examination of the authorities on this occasion, came to the conclusion (in which the other judges of the Court of King's Bench concurred) that it was the solemnity of the instrument and delivery by the infant himself, and not the semblance of benefit to him, that constituted the true line of distinction between void and voidable deeds of the infant.

But he admitted that there were respectable sayings the other way. The point was held by the Court not necessary to the determination of that case, because, in that case, the circumstances

¹ See Russell v. Lee, 1 Lev. 86; lis v. Dineley, 8 M. & Selw. 470; Co. Fisher v. Mowbray, 8 East. 330; Bay- Lit. 172 a.

showed that there was a semblance of benefit sufficient to make the deed voidable only, upon the matter of the conveyance.

There can be little doubt that the decision in Zouch v. Parsons was perfectly correct; for it was the case of an infant mortgagee, releasing by a lease and release his title to the premises, upon the payment of the mortgage money by a second mortgagee, with the consent of the mortgagor. It was precisely such an act as the infant was bound to do; and would have been compelled to do by a court of equity, as a trustee of the mortgagor. And certainly it was for his interest to do what a court of equity would by a suit have compelled him to do. 1 Upon this occasion, Lord Mansfield and the Court approved of the law as laid down by Perkins (Sect. 12), that "all such gifts, grants, or deeds made by infants, which do not take effect by delivery of his hand, are void. But all gifts, grants, or deeds made by infants by matter. of deed or in writing, which do take effect by delivery of his hand, are voidable by himself, by his heirs, and by those who have his estate;" and in Lord Mansfield's view, the words "which do take effect" are an essential part of the definition; and exclude letters of attorney or deeds which delegate a mere power and convey no interest.² So that, according to Lord Mansfield's opinion, there is no difference between a feoffment and any deeds which convey an interest. In each case, if the infant makes a feoffment or delivers a deed in person, it takes effect by such delivery of his hand, and is voidable only. But if either be done by letter of attorney from the infant, it is void, for it does not take effect by a delivery of his hand.

There are other authorities, however, which are at variance with this doctrine of Lord Mansfield, and which put a different interpretation upon the language of Perkins. According to the latter, the semblance of benefit to the infant or not is the true ground of holding his deed voidable or void. That it makes no difference whether the deed be delivered by his own hand or not; but whether it be for his benefit or not. If the former, then it is voidable; if the latter, then it is void. And that Perkins in the passage above stated, in speaking of gifts and

¹ See — v. Handcock, 17 Ves.

² See Saunders v. Marr, 1 H. Black.

383; 1 Fonbl. Eq., b. 1, ch. 2, s. 5,

and notes; Co. Lit. 172 a; Com. Dig.

"Enfant," B. 5.

grants taking effect by the delivery of the infant's hand, did not refer to the delivery of the deed, but to the delivery of the thing granted; as, for instance, in the case of a feoffment to a delivery of seisin by the infant personally; and in case of chattels by a delivery of the same by his own hand. This is the sense in which the doctrine of Perkins is laid down in Sheppard's Touchstone, 232.1 Of this latter opinion, also, are some other highly respectable text-writers; 2 and perhaps the weight of authority, antecedent to the decision in Zouch v. Parsons, inclined in the same way. Lord Chief Justice Eyre, in Keane v. Boycott, 2 Hen. Black. 515, alluded to this distinction in the following After having corrected the generality of some expressions in Litt. s. 259, he added: "We have seen that some contracts of infants, even by deed, shall bind them; some are merely void, namely, such as the Court can pronounce to be to their prejudice; others, and the most numerous class, of a more uncertain nature as to benefit or prejudice, are voidable only; and it is in the election of the infant to affirm them or not. In Roll. Abridg., title 'Enfants,' 1 Roll. Abridg. 728, and in Com. Dig. under the same title, instances are put of the three different kinds of good, void, and voidable contracts. Where the contract is by deed, and not apparently to the prejudice of the infant, Comyn states it as a rule that the infant cannot plead non est factum, but must plead his infancy. It is his deed; but this is a mode of disaffirming it. He, indeed, states the rule generally, but I limit it to that case in order to reconcile the doctrine of void and voidable contracts." A doctrine of the same sort was held by the Court in Thompson v. Leach, 3 Mod. 310; in Fisher v.

1 See Dearborn v. Eastman, 4 N. H. 441, where it was held that, if an infant make a conveyance in pais of his land in any other manner than by a feoffment, an entry into the land by the grantee may be treated by the infant as a trespass, without any entry on his part to avoid the conveyance; that a feoffment by an infant is only voidable, but all other conveyances in pais stand on the same ground as executory contracts, and are void or voidable at his election.

² See Preston on Conveyancing, 248 to 250; Com. Dig. "Enfant," C. 2; Shep. Touch. 232, and Acherly's note; Bac. Abridg. "Infancy," I. 3; English Law Journal for 1804, p. 145; 8 Amer. Jurist, 327. But see 1 Powell on Mortg. by Coventry, note to p. 208; Zouch v. Parsons, 1 W. Black. 575; Ellsley's notes (4) and (v); Co. Lit. 51, 6, Harg. note, 331; Holmes v. Blogg, 8 Taunt. 508; 1 Fonbl. Eq., b. 1, ch. 11, s. 3, and notes (y), (z), (a), (b).

Mowbray, 8 East, 330; and Baylis v. Dineley, 3 M. & Selw. 477. In the two last cases the Court held that an infant cannot bind himself in a bond with a penalty, and especially to pay interest. In the case of Baylis v. Dineley, Lord Ellenborough said: "In the case of the infant lessor, that being a lease, rendering rent, imported on the face of it a benefit to the infant, and his accepting the rent at full age was conclusive that it was for his benefit. But how do these authorities affect a case like the present, where it is clear upon the face of the instrument that it is to the prejudice of the infant, for it is an obligation with a penalty and for the payment of interest? Is there any authority to show that if upon looking to the instrument, the Court can clearly pronounce that it is to the infant's prejudice, they will, nevertheless, suffer it to be set up by matter ex post facto after full age?" And then, after commenting on Keane v. Boycott and Fisher v. Mowbray, he added: "In Zouch v. Parsons, where this subject was much considered, I find nothing which tends to show that an infant may bind himself to his prejudice. It is the privilege of the infant that he shall not; and we should be breaking down the protection which the law has cast around him if we were to give effect to a confirmation by parol of a deed like this made during his infancy." It is apparent, then, upon the English authorities, that however true it may be that an infant may so far bind himself by deed in certain cases, as that in consequence of the solemnity of the instrument, it is voidable only, and not void; yet that the instrument, however solemn, is held to be void, if upon its face it is apparent that it is to the prejudice of the infant. This distinction, if admitted, would go far to reconcile all the cases; for it would decide that a deed by virtue of its solemnity should be voidable only, unless it appeared on its face to be to his prejudice, in which case it would be void.1 The same question has undergone no inconsiderable discussion in the American Courts. In Oliver v. Houdlet, 13 Mass. 239, the Court seemed to think the true rule to be that those acts of an infant are void which not only apparently but necessarily operate In Whitney v. Dutch, 14 Mass. 462, the same to his prejudice. Court said that, whenever the act done may be for the benefit of the infant, it shall not be considered void; but that he shall have his election, when he comes of age, to affirm or avoid it.

^{1 1} See Bac. Abridg. "Infancy & Age," L 3, 1, 7.

they added that this was the only clear and definite proposition which can be extracted from the authorities. In Conroe v. Birdsall, 1 Johns. Cas. 127, the Court approved of the doctrine of Perkins, § 12, as it was interpreted and adopted in Zouch v. Parsons; and in the late case of Roof v. Stafford, 7 Cowen, 180, 181, the same doctrine was fully recognized. But in an intermediate case, Jackson v. Burchin, 14 Johns. 126, the Court doubted whether a bargain and sale of lands by an infant was a valid deed to pass the land, as it would make him stand seised to the use of another. And that doubt was well warranted by what is laid down in 2 Inst. 673, where it is said that if an infant bargain and sell lands which are in the realty by deed indented and enrolled, he may avoid it when he will, for the deed was of no effect to raise a use. The result of the American decisions has been correctly stated by Mr. Chancellor Kent in his learned Commentaries (2 Com. Lect. 31) to be that they are in favor of construing the acts and contracts of infants generally to be voidable only, and not void, and subject to their election when they become of age either to affirm or disallow them; and that the doctrine of Zouch v. Parsons has been recognized and adopted as law. It may be added that they seem generally to hold that the deed of an infant conveying lands is voidable only, and not void, unless, perhaps, the deed should manifestly appear on the face of it to be to the prejudice of the infant; and this upon the nature and solemnity, as well as the operation, of the instrument.

It is not, however, necessary for us in this case to decide whether the present deed, either from its being a deed of bargain and sale, or from its nature as creating a trust for a sale of the estate, or from the other circumstances of the case, is to be deemed void or voidable only. For if it be voidable only and has been avoided by the infant, then the same result will follow, that the plaintiff's title is gone. Let us, then, proceed to the consideration of the other point, whether, supposing the deed to Wallach to be voidable only, it has been avoided by the subsequent deed of Barry to Mrs. Moreland.

There is no doubt that an infant may avoid his act, deed, or contract, by different means, according to the nature of the act and the circumstances of the case. He may sometimes avoid it

¹ See Boston Bank v. Chamberlain, 15 Mass. 220.

by matter in pais, as in case of a feoffment by an entry, if his entry is not tolled; sometimes by plea, as when he is sued upon his bond or other contract; sometimes by suit, as when he disaffirms a contract made for the sale of his chattels, and sues for the chattels; sometimes by a writ of error, as when he has levied a fine during his nonage; sometimes by a writ of audita querela, as when he has acknowledged a recognizance, or statute staple or merchant; sometimes, as in the case of an alienation of his estate during his nonage, by a writ of entry, dum fuit infra ætatem, after his arrival of age. The general result seems to be that where the act of the infant is by matter of record, he must avoid it by some act of record (as, for instance, by a writ of error, or on audita querela) during his minority. But if the act of the infant is a matter in pais, it may be avoided by an act in pais of equal solemnity or notoriety; and this, according to some authorities, either during his nonage or afterwards; and according to others, at all events, after his arrival of age.2 In Co. Lit. 380 b, it is said, "Herein a diversity is to be observed between matters of record done or suffered by an infant and matters in fait; for matters in fait he shall avoid either within age or at full age, as hath been said; but matters of record, as statutes merchants, and of the staple, recognizances acknowledged by him, or a fine levied by him, recovery against him, &c. must be avoided by him; viz., statutes, &c., by audita querela; and the fine and recovery by a writ of error during his minority, and the like." In short, the nature of the original act or conveyance generally governs as to the nature of the act required to be done in the disaffirmance of it. If the latter be of as high and solemn a nature as the former, it amounts to a valid avoidance of it. We do not mean to say that in all cases the act of disaffirmance should be of the same or of as high and solemn a nature as the original act, for a deed may be avoided by a plea. But we mean only to say that if the act of disaffirmance be of as high and solemn a nature there is no ground to impeach its sufficiency. Lord Ellenborough in Baylis v. Dineley, 3 Maule

¹ See Com. Dig. "Enfant," B. 1, 2, C. 2, 3, 4, 5, 8, 9, 11; 2 Inst. 673; 2 Kent, Comm. Lect. 31; Bac. Abridg. "Infancy & Age," I. 5, I. 7.

² See Bac. Abridg. "Infancy &

Age," I. 3, I. 5, I. 7; Zouch v. Parsons, 3 Burr. 1794; Roof v. Stafford, 7 Cowen, 179, 183; Com. Dig. "Enfant," C. 9, C. 4, C. 11.

& Selw. 481, 482, held a parol confirmation of a bond given by an infant after he came of age to be invalid, insisting that it should be by something amounting to an estoppel in law of as high authority as the deed itself; but that the same deed might be avoided by the plea of infancy.

There are cases, however, in which a confirmation may be good without being by deed; as in case of a lease by an infant, and his receiving rent after he came of age.¹

The question then is, whether in the present case the deed to Mrs. Moreland, being of as high and solemn a nature as the original deed to Wallach, is not a valid disaffirmance of it. We think it is. If it was a voidable conveyance which had passed the seisin and possession to Wallach, and he had remained in possession, it might, like a feoffment, have been avoided by an entry by an infant after he came of age.2 But in point of fact Barry remained in possession; and therefore he could not enter upon himself. And when he conveyed to Mrs. Moreland, being in possession, he must be deemed to assert his original interest in the land, and to pass it in the same manner as if he had entered upon the land and delivered the deed thereon, if the same had been in an adverse possession. The case of Jackson v. Carpenter, 11 Johns. 539, and Jackson v. Burchin, 14 Johns. 124, are directly in point, and proceed upon principles which are in perfect coincidence with the common law and are entirely satisfactory. Indeed, they go farther than the circumstances of the present case require; for they dispense with an entry where the possession was out of the party when he made the second deed.

In Jackson v. Burchin, the Court said, that it would seem not only upon principle but authority, that the infant can manifest his dissent in the same way and manner by which he first assented to convey. If he has given livery of seisin, he must do an act of equal notoriety to disaffirm the first act; he must enter on the land and make known his dissent. If he has conveyed by bargain and sale, then a second deed of bargain and sale will be equally solemn and notorious in disaffirmance of the first.³

¹ See Bac. Abridg. "Infancy & Age," I. 8.

² See Inhabitants of Worcester v.

Eaton, 13 Mass. 375; Whitney v. Dutch, 14 Mass. 462.

⁸ See the same point, 2 Kent, Com. Lect. 31.

We know of no authority or principle which contradicts this doctrine. It seems founded in good sense, and follows out the principle of notoriety of disaffirmance in the case of a feoffment by an entry; that is, by an act of equal notoriety and solemnity with the original act. The case of Frost v. Wolverton, 1 Strange, 94, seems to have proceeded on this principle. Upon these grounds, we are of opinion, that the deed of Barry to Mrs. Moreland was a complete disaffirmance and avoidance of his prior deed to Wallach; and consequently the instruction given by the Circuit Court was unexceptionable. To give effect to such disaffirmance, it was not necessary that the infant should first place the other party in statu quo. The second bill of exceptions taken by the plaintiff turns upon the instructions asked upon the evidence stated therein, and scarcely admits of abbreviation. It is as follows: "The plaintiff, further to maintain and prove the issue on his side, then gave in evidence, by competent witnesses, facts tending to prove that the said Richard N. Barry had attained the full age of twenty-one years on the fourteenth day of September, 1831; and that in the month of November, 1831, the said defendant, who was the mother of the said Richard, did assert and declare that said Richard was born on the fourteenth day of September, 1810; and that she did assert to Dr. McWilliams, a competent and credible witness, who deposed to said facts, and who was the accoucheur attending on her at the period of the birth of her said son, that such birth actually occurred on the said fourteenth of September, 1810, and applied to said Dr. McWilliams to give a certificate and deposition that the said day was the true date of the birth; and thereupon the counsel for the plaintiff requested the Court to instruct the jury: '1. That, if the said jury shall believe, from the said evidence, that the said Richard N. Barry was of full age, and above the age of twentyone years, at the time of the execution of said deed to said Wallach; or, if the defendant shall have failed to satisfy the jury, from the evidence, that said Barry was, at the said date, an infant under twenty-one years, that then the plaintiff is enti-2. Or, if the jury shall believe, from the said tled to recover. evidence, that, if said Richard was under age at the time of the execution of said deed, that he did, after his arrival at age, voluntarily and deliberately recognize the same as an actual conveyance of his right, or, during a period of several months,

acquiesce in the same without objection, that then the said deed cannot now be impeached on account of the minority of the gran-3. That the said deed from the said Richard N. Barry to the defendant, being made to her with full notice of said previous deed to said Wallach, and including other and valuable property, is not so inconsistent with said first deed as to amount to a disaffirmance of the same. 4. That, from the relative position of the parties to said deed to defendant, at and previous to its execution, and, from the circumstances attending it, the jury may infer that the same was fraudulent and void. 5. That if the lessors of plaintiff were induced, by the acts and declarations of said defendant, to give a full consideration for said deed to Wallach, and to accept said deed as a full and only security for the debt bona fide due to them, and property bona fide advanced by them, and to believe that the said security was valid and effective, that then it is not competent for said defendant in this action to question or deny the title of said plaintiff under said deed, whether the said acts and declarations were made fraudulently, and for the purpose of practising deception; or whether said defendant, from any cause, wilfully misrepresented the truth.' Whereupon, the Court gave the first of the said instructions so prayed, as aforesaid, and refused to give the others. which refusal the counsel for the plaintiff excepted." The first instruction, being given by the Court, is, of course, excluded from our consideration on the present writ of error. The second instruction is objectionable on several accounts.

In the first place, it assumes, as matter of law, that a voluntary and deliberate recognition by a person after his arrival at age, of an actual conveyance of his right during his nonage, amounts to a confirmation of such conveyance. In the next place, that a mere acquiescence in the same conveyance, without objection, for several months after his arrival at age, is also a confirmation of it. In our judgment, neither proposition is maintainable.

The mere recognition of the fact that a conveyance has been made, is not, per se, proof of a confirmation of it. Lord Ellenborough, in Baylis v. Dineley (3 M. & Selw. 482), was of opinion that an act of as high a solemnity as the original act was necessary to a confirmation. "We cannot," said he, "surrender the interests of the infant into such hands as he may

chance to get. It appears to me that we should be doing so in this case" [that of a deed], "unless we required the act after full age to be of as great a solemnity as the original instrument." Without undertaking to apply this doctrine to its full extent, and admitting that acts in pais may amount to a confirmation of a deed, still, we are of opinion, that these acts should be of such a solemn and unequivocal nature as to establish a clear intention to confirm the deed, after a full knowledge that it was avoidable. A fortiori mere acquiescence, uncoupled with any acts demonstrative of an intent to confirm it, would be insufficient for the purpose.

In Jackson v. Carpenter, 11 Johns. 542, 543, the Court held, that an acquiescence by the grantor in a conveyance made during his infancy, for eleven years after he came of age, did not amount to a confirmation of that conveyance; that some positive act was necessary, evincing his assent to the conveyance. In Curtin v. Patton, 11 Serg. & Rawle, 311, the Court held, that to constitute a confirmation of a conveyance or contract by an infant, after he arrives of age, there must be some distinct act, by which he either receives a benefit from the contract after he arrives at age, or does some act of express ratification.

There is much good sense in these decisions, and they are indispensable to a just support of the rights of infants according to the common law. Besides, in the present case, as Barry was in possession of the premises during the whole period until the execution of his deed to Mrs. Moreland, there was no evidence to justify the jury in drawing any inference of any intentional acquiescence in the validity of the deed to Wallach. third instruction is, for the reasons already stated, unmaintain-The deed to Mrs. Moreland contains a conveyance of the very land in controversy, with a warranty of the title against all persons claiming under him (Barry), and a covenant that he had good right and title to convey the same; and, therefore, is a positive disaffirmance of the former deed. The fourth instruction proceeds upon the supposition, that, if the deed to Mrs. Moreland was fraudulent between the parties to it, it was utterly void, and not merely voidable. But it is clear that between the parties it would be binding and available; however, as to the persons whom it was intended to defraud, it might be avoidable.

¹ See Boston Bank v. Chamberlain, 15 Mass. 220.

Even if it was made for the very purpose of defeating the conveyance to Wallach, and was a mere contrivance for this purpose, it was still an act competent to be done by Barry, and amounted to a disaffirmance of the conveyance to Wallach. In many cases, the disaffirmance of a deed made during infancy is a fraud upon the other party.

But this has never been held sufficient to avoid the disaffirmance, for it would otherwise take away the very protection which the law intends to throw around him, to guard him from the effects of his folly, rashness, and misconduct. In Saunderson v. Marr, 1 H. Bl. 75, it was held, that a warrant of attorney given by an infant, although there appeared circumstances of fraud on his part, was utterly void, even though the application was made to the equity side of the Court, to set aside a judgment founded So, in Conroe v. Birdsall, 1 Johns. Cas. 127, a bond made by an infant, who declared at the time that he was of age, was held void, notwithstanding his fraudulent declaration; for the Court said that a different decision would endanger all the rights of infants. A similar doctrine was held by the Court in Curtin v. Patton, 11 Serg. & Rawle, 309, 810. Indeed the same doctrine is to be found affirmed more than a century and a half ago, in Johnson a Pie, 1 Lev. 169; s. c. 1 Sid. 258; 1 Keb. 995, 913.1

But what are the facts on which the instruction relies as proof of the decd to Mrs. Moreland being fraudulent and void? They are "the relative positions of the parties to said deed, at and previous to its execution;" that is to say, the relation of mother and son, and the fact that she had then instituted a suit against him, and arrested him and held him to bail, as stated in the evidence; and "from the circumstances attending the execution of it;" that is to say, that Mrs. Moreland was informed by Barry, before his deed to her, that he had so conveyed the said property to Wallach, and that subsequently, and with such knowledge, she prevailed on Barry to execute to her the same Now, certainly, these facts alone could not justly conveyance. authorize a conclusion that the conveyance to Mrs. Moreland was fraudulent and void; for she might be a bona fide creditor of her And the consideration averred in that conveyance showed her to be a creditor, if it was truly stated (and there was no

¹ See Bac. Abridg. "Infancy & Age," H.; 2 Kent Com. Lect. 31.

evidence to contradict it); and if she was a creditor, then she had a legal right to sue her son, and there was no fraud in prevailing on him to give a deed to satisfy that debt. It is probable that the instruction was designed to cover all the other facts stated in the bill of exceptions, though in its actual terms it does not seem to comprehend them. But, if it did, we are of opinion that the jury would not have been justified in inferring that the deed was fraudulent and void. In the first place, the proceedings in the Orphans' Court may, for aught that appears, have been in good faith, and under an innocent mistake of a year of the actual age In the next place, if not so, still the mother and the son were not estopped in any other proceeding to set up the nonage of Barry, whatever might have been the case as to the parties and property involved in that proceeding. In the next place, there is not the slightest proof that these proceedings had at the time any reference to, or intended operation upon, the subsequent deed made to Wallach; or that Mrs. Moreland was party to, or assisted in the negotiations or declarations on which the deed to Wallach was founded. Certainly, without some proofs of this sort, it would be going too far to assert, that the jury might infer that the deed to Mrs. Moreland was fraudulent. Fraud is not presumed either as a matter of law or fact, unless under circumstances not fairly susceptible of any other interpretation.

The fifth instruction was properly refused by the Court, for the plain reason that there was no evidence in the case of any acts or declarations by Mrs. Moreland to the effect therein stated. It was, therefore, the common case of an instruction asked upon a mere hypothetical statement, ultra the evidence. The third bill of exceptions is as follows: "The Court having refused the second, third, fourth, and fifth instructions prayed by the plaintiffs, and the counsel, in opening his case to the jury, contending that the questions presented by the said instructions were open to the consideration of the jury; the counsel for the defendant thereupon prayed the Court to instruct the jury that, if from the evidence so as aforesaid given to the jury, and stated in the prayers for the said instructions, they should be of opinion that the said Richard was under the age of twenty-one years at the time he made his deed, as aforesaid, to the said Richard Wallach, under whom the plaintiffs claim their title in this

case, and that, at the time he made his deed, as hereinbefore mentioned, to the defendant, he was of full age; that such lastmentioned deed was a disaffirmance of his preceding deed to him, the said Richard Wallach; and that in that case the jury ought to find their verdict for the defendant; and that the evidence upon which the second, third, fourth, and fifth instructions were prayed by the plaintiff, as aforesaid, which evidence is set forth in the instructions so prayed, is not competent in law to authorize the jury to find a verdict for the plaintiff upon any of the grounds, or for any of the reasons set forth in the said prayers, or to authorize them to find a verdict for the plaintiff, if they should be of opinion that the said Richard Barry was under the age of twenty-one years at the time he made his deed, as aforesaid, to the said Richard Wallach. Which instruction the Court gave as prayed, and the counsel for the plaintiff excepted thereto." It is unnecessary to do more than to state that the bill of exceptions is completely disposed of by the considerations already mentioned. It contains no more than the converse of the propositions stated in the second bill of exceptions, and the reassertion of the instruction given by the Court in the first bill of exceptions. Upon the whole, it is the opinion of the Court, that the judgment of the Circuit Court ought to be affirmed with costs.

MUSTARD v. WOHLFORD'S HEIRS.

(15 Grat. 329. Court of Appeals of Virginia, 1859.)

Title Bond of Infant. — Disaffirmance. — Conveyance by one out of Possession. —
The Effect of the Disaffirmance. — Return of Consideration on avoidance of
contracts executed and executory considered.

ALEXANDER NISEWANDER, being entitled to an undivided fifth of a tract of land, subject to his mother's life-estate in one third thereof, contracted, during his infancy, to sell his said interest to John Mustard for the sum of eight hundred dollars; and on the same day, to wit, the 16th day of January, 1852, executed a title bond in the penalty of one thousand six hundred dollars, conditioned to make a good deed with general warranty to the purchaser for the said interest on the 3d of November, 1853, that

being the day on which the vendor would attain the age of twenty-one years. Three hundred dollars of the purchase-money were paid, according to the contract, in a house and lot in Mechanicsburg. No other payment was made during the infancy of the vendor, except about forty dollars, the amount of a debt assumed for him by the vendee. For the balance of the purchasemoney, the vendee executed his bond, but it does not appear when it was made payable; though it was, probably, when the deed should be executed by the vendor, on or after his arrival at lawful age. It does not appear that any deed, or even titlebond, was ever executed to Nisewander for the house and lot in Mechanicsburg. It seems that that property was worth about three hundred dollars, and that he might have sold it for that sum if he had been of age, or could have given security to make a good title when he became of age. But not being able to do so, and being in want of money, he offered to sell it for one hundred dollars; and, among others, offered to sell it to the appellant Mustard at that price. The appellant said he did not want it, but that his son Hugh would buy it. And Nisewander did sell it to Hugh Mustard and Addison Harmon for about one hundred dollars; which was accordingly paid. The same property was afterwards sold by the appellant to another person for three hundred dollars, paid partly in cash and the balance in Nisewander, having become dissatisfied with his sale to the appellant, determined, and often declared, that he would not, on his arrival at age, confirm the sale and make a deed according to his title-bond; and these declarations were sometimes made in presence of one or two of the appellant's sons, but not of the appellant himself. After his arrival at age, he persisted in this determination, and so declared; and on the 8th day of November, 1853, he contracted to sell his interest in the land to Samuel Wohlford for eight hundred dollars; of which one hundred dollars was paid in cash, and for the balance three bonds were executed, payable at future periods; and he executed a titlebond, conditioned to make a deed before the last payment should become due. When Nisewander applied to Wohlford to make this purchase, the latter knew that the former had contracted during infancy to sell his interest to the appellant, and asked him if he did not intend to comply with his said contract; and the former replied that he did not; whereupon the latter made the purchase,

and received the title-bond aforesaid. A few days after this purchase the appellant endeavored to obtain from Nisewander indemnity for the money paid on their contract as aforesaid; and, failing in that, endeavored to induce Wohlford to agree to rescind his contract with Nisewander upon the return of the money and bonds received by the latter; but Wohlford refused Shortly thereafter, to wit, on the 18th of November, 1853, the appellant induced Nisewander to execute a deed conveying the land to him, in consideration of the sum of nine hundred dollars, being one hundred dollars more than the amount of the purchase-money before agreed upon between them; which sum of one hundred dollars was paid at the time of the execution of the deed. Very soon after the execution of the said deed, and during the same month of November, 1853, Wohlford instituted this suit for the purpose of having the deed annulled, as having been fraudulently obtained by the appellant with a full knowledge of the equitable rights of Wohlford, and of obtaining the legal title to the said interest, and a partition of the land and an allotment of his several portion thereof. The appellant in his answer admits that he obtained the deed with full notice of the prior sale and title-bond to Wohlford, but says, in substance, that he had long previously purchased the same property, and received a title-bond therefor from Nisewander during his infancy, of which purchase and title-bond, as well as of the fact that respondent had paid a considerable part of the purchasemoney, the plaintiff had full notice at the time he made his purchase and obtained his title-bond as aforesaid; that whether the plaintiff had such notice or not, respondent insists that, having acquired the first equitable title, he had a right, notwithstanding his knowledge of any subsequently acquired equity of the plaintiff, to perfect his purchase, if he could, by obtaining a conveyance of the legal title; that, although Nisewander was under age at the date of the title-bond to respondent, yet it was not on that account void, but only voidable, and might be affirmed or disaffirmed at the election of said vendor after he arrived at lawful age; that the sale and title-bond to Wohlford were not a disaffirmance, but the deed to respondent was an affirmance of the said title-bond to respondent, notwithstanding the payment of the additional sum of one hundred dollars as aforesaid, which was not intended to change the original contract, but merely to

induce its affirmance; which respondent had a right to do. Nisewander, in his answer, admits the contracts of sale made by him with the appellant and Wohlford respectively, the former before and the latter after he became of age, and states that a considerable portion of the purchase-money due under the former contract was paid, or attempted to be paid, in a house and lot for which he had no use, and owing to the advantage thus taken of him, he determined, before he became of age, and expressed the determination frequently and publicly, that he would not confirm the contract; that after he became of age he expressed the same determination to various persons, and among them to Wohlford, and offered to sell him the land, which Wohlford then bought; that after making this contract with Wohlford, he was, by the free use of liquor supplied by Powers, acting for Mustard, prevailed upon to make a deed for the land to Mustard, which he would not have done if he had been sober; that at the time of the execution of the deed Mustard paid him one hundred dollars more than the original contract price; and that the sale to Wohlford was a fair one, made when respondent was sober, for a fair consideration, and he had no desire to defeat it. facts, as before stated, are fully proved by the evidence, which also tends to prove that the deed from Nisewander to Mustard was obtained by undue and improper means practised by the agent of the latter; but that fact is immaterial, in the view taken of the case by the Court. On the 11th of April, 1857, a decree was rendered in the cause, reciting that, Wohlford having died pending the suit, it had been revived in the name of his heirs, declaring the deed from Nisewander to Mustard to be fraudulent and void, directing the same to be set aside and cancelled, and that Mustard should convey to the said heirs all the title vested in him by said deed, and appointing commissioners to make partition as prayed for in From that decree, Mustard applied to this Court for an appeal, which was allowed.1

Moncure, J., delivered the opinion of the Court. The Court is of opinion, that the contract of the 16th of January, 1852, between Nisewander and the appellant, though made when the former was under age, and when that fact was known to the appellant, was not a void contract, but only voidable, and subject to be affirmed or disaffirmed by the former, after his arrival

¹ Arguments omitted. — ED.

at age. "The tendency of the modern decisions," says Chancellor Kent, "is in favor of the reasonableness and policy of a very liberal extension of the rule, that the acts and contracts of infants should be deemed voidable only, and subject to their election, when they become of age, either to affirm or disavow them." 2 Kent Com. 235. The authorities on this subject are fully collected in the valuable notes of Hare and Wallace, appended to the case of Tucker, &c. v. Moreland, in 1 Amer. Lead. Cas., ed. 1857, pp. 224-267. And from the numerous decisions which have been had in this country, the annotators deduce the following definite rule, as one that is subject to no exceptions. "The only contract binding on an infant is the implied contract for necessaries; the only act which he is under a legal incapacity to perform is the appointment of an attorney: all other acts and contracts, executed or executory, are voidable or confirmable by him at his election." Id. 244. It is not material that the title-bond in this case is in a penal sum; though it has been said that a bond of an infant with a penalty is void. Coke Lit. 172 a, recognized as being still the law by BAYLY, J., in 3 Maule & Sel. 482. The penalty of the bond is a mere matter of form, the substance of the contract being the condition on which may be maintained an action of covenant at law or a suit for specific performance in equity. See also 3 Rob. Pr. (new) 221-228. The Court is further of opinion that the said contract was disaffirmed by the contract of the 8th of November, 1853, between Nisewander and Wohlford, made after the former arrived at age. There is no evidence, nor even pretence, of any affirmance of the former contract by Nisewander after he arrived at age and before he entered into the latter, which was but eight days after his arrival at age. On the contrary, he persisted during that period in declaring that he would not confirm the former contract. Then the question is, Did not the latter amount to a disaffirmance of the former? A voidable act of an infant may be avoided by different means, according to the nature of the act, but, without undertaking to enumerate them, it is sufficient for the purposes of this case to say, that such an act may certainly be avoided by him after he becomes of age, by an act of the same nature and dignity. Thus a feoffment may be avoided by a feoffment; a deed of bargain and sale, by a deed of bargain and sale; a title-bond, by a title-bond, &c.; the two acts in these

cases being of the same nature and dignity. It is not necessary, in order to produce that effect, that the latter act should expressly disaffirm the former. It is enough that the two acts are inconsistent with each other; in which case the former is disaffirmed by plain and necessary implication. The case of Frost v. Wolveston, 1 Strange, 94, seems to have proceeded on this principle. There an infant covenanted to levy a fine by a certain time, to certain uses; and before he came of age he levied the fine, and by another deed, made at full age, he declared it to be to other uses: the Court held that the last deed should be the one to lead the uses. So also did the cases of Jackson v. Carpenter, 11 Johns. 589; Jackson v. Burchin, 14 id. 124; and Tucker v. Moreland, 10 Peters, 58. In these cases, deeds of bargain and sale were avoided by deeds of the same nature to other bargainees. In the last of them, Judge Story said the first two "are directly in point, and proceed upon principles which are in perfect coincidence with the common law, and are entirely satisfactory." In these cases the first grantee was not in actual possession when the second deed was executed, but the land was either vacant, or the grantor remained in possession. If there be an adverse possession, then it is said, in those States where one out of possession cannot sell, there should be an entry by the grantor in order to avoid the first deed by another. Am. Lead. Cas. 257, and the cases cited. But no entry is necessary in those States in which one out of possession of real estate can sell his interest therein. 1 Parsons on Cont. 273. That is the case in this State, under the Code, ch. 116, §§ 4, 5, p. 500; which provides, "that all real estate shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery," and that "any interest in or claim to real estate may be disposed of by deed or will." Carrington v. Goddin, 13 Gratt. 587. But in this case, though the first vendee appears to have been in possession when the second titlebond was executed, such possession was not adverse to the vendor, but in subordination to the title which still remained in him, and which would have been conveyed by him independently of the statute, and without any actual entry. In any view of the case, therefore, the contract with Wohlford was a disaffirmance of the contract with the appellant.

The Court is further of opinion, that the effect of such dis-

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affirmance was to render the first-mentioned contract void; to extinguish any interest in law or equity the appellant may have acquired under it; and to entitle Nisewander, or his vendee, Wohlford, in his name, to recover possession of the land in an action at law, and hold it free from any equity of the appellant. When a voidable contract of an infant is disaffirmed by him, it is made void ab initio by relation, and the parties revert to the same situation as if the contract had not been made. 1 Am. Lead. Cas. 259; Boyden v. Boyden, &c., 9 Met. 519, 521. If the contract was one of sale by the infant, he becomes reinvested with his title to the property, and may demand and recover it, not only of the vendee, but of any other person who may have it in possession. The right of an infant to avoid his contract is an absolute and paramount right, superior to all equities of other persons, and may therefore be exercised against purchasers from the vendee. 1 Am. Lead. Cas. 258; citing Myers, &c. v. Sanders's Heirs, 7 Dana, 506, 521, and Hill v. Anderson, 5 Smedes & Marsh. 216, 224. He who deals with an infant deals at his peril, and subject to this right of the infant to disaffirm and avoid the contract. This is the case, even though he deal in ignorance of the infancy, and on the fraudulent representation of the infant that he is of full age. Van Winckle v. Ketcham, 3 Caines's Cas. 323; Conroe v. Birdsall, 1 Johns. Cas. 127, and other cases cited in 1 Am. Lead. Cas. 249. A fortiori it is the case where, as here, the dealing is with full knowledge on the part of the adult of the infancy of the other contracting party. While the effect of avoiding the contract of sale by an infant is, on the one hand, to entitle him to demand and recover the property sold, so it is, on the other hand, to entitle the other contracting party to demand and recover the consideration received by the infant, or so much of it as may then remain in his hands Indeed, if the infant, after arriving at age, and before any act of disaffirmance by him, alien any part of the consideration, or exercise any unequivocal act of ownership over it, or retain it in his hands in kind for an unreasonable length of time, he may thereby affirm the contract and render it absolutely bind-Id. 255. But if he has, during infancy, wasted, sold, or otherwise ceased to possess the consideration, and has none of it in his hands in kind on his arrival at age, he is not liable therefor, and may recover possession of the property sold by him (at

least if the contract of sale be executory merely on his part) without accounting for the consideration received. rule," as stated in Story on Contracts, § 42, "seems to be, that when articles are furnished to the infant which do not come within the definition of necessaries, and which are consumed or parted with, or when money is lent which is expended by the infant, the other party has no remedy to recover an equivalent for the goods or money; the specific consideration given by him being parted with, or not being capable of return. But when the specific consideration, whatever it be, exists, and remains in the hands of the infant at the time of the disaffirmance of the contract, and is capable of return, the infant is bound to give it up, and he is treated as a trustee of the other party, if the contract be made originally in good faith. The ground of such a distinction is, that, in the first case, the goods or money cannot be returned; and to make the infant liable therefor in damages, merely because they had been used by him, would be to deprive him of his privilege of affirming or avoiding his contract." See also Boody v. McKenney, 23 Maine, 517. In the case of an executed sale by an infant, it has been held, that if he disaffirm the sale and seek to recover back the article sold, he must restore the purchase-money or other consideration, Smith v. Evans, 5 Humph. 70; Badger v. Phinney, 15 Mass. 359, 363; and if he go into chancery to set aside his conveyance, he must offer in his bill to restore the purchase-money. Hillyer v. Bennett, 3 Edw. Ch. 222. Without expressing any opinion upon this question, it is sufficient for the purposes of this case to say, that no case of an executory contract of sale by an infant has been found, in which the infant, disaffirming the contract after his arrival at age, has been held accountable for the consideration received and spent by him during his infancy; but all the authorities on the subject seem to be the other way. If the infant in any such case has delivered possession of land contracted to be sold by him, he has an unconditional right to recover it back in an action at law; and a Court of equity will not restrain him from doing so, nor impose terms upon the exercise of his right. Such was the decision of the Court in Brawner & Wife v. Franklin, &c., 4 Gill, 463. Dorsey, J., in delivering the opinion of the Court, said: "Establish the doctrine now contended for, and what is the result? Why, that the whole policy of the

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law as to infantile incompetency to sell, waste, and dispose of their property and estates is frustrated. . . . An infant may sell his patrimonial estate, prodigally waste the purchase-money in extravagance, gambling, and dissipation; and, if, when arrived at years of maturity and discretion, he disaffirm the contract, and sue at law for the recovery of his property, a Court of equity will by injunction, arrest the arm of the law, and say to him, Before you shall further assert your claim to your estate, you must repay to the purchaser all the money you have received from him." To such a doctrine the Court refused to subscribe, and, we think, rightly so. The Court is further of opinion, that the appellant, having no equity in regard to the land when he obtained the deed of the 18th of November, 1853, and having obtained it with full knowledge of the equity of Wohlford, can derive no benefit from the said deed, but holds the legal title acquired under it in trust for the heirs of Wohlford, and may be compelled by a Court of equity to convey said title to them. purchaser for valuable consideration without notice of a prior equity, and having the legal estate, is entitled to priority in equity as well as at law, according to the maxim, that where equities are equal the law shall prevail. He is a great favorite of a Court of equity, and has been protected to such an extent as to be allowed to take advantage of a deed which he stole out of a window by means of a ladder, and a deed obtained by a third person without consideration, and by fraud. Flagg's Case, cited in 1 Vern. 52; Harcourt v. Knowel, cited in 2 Vern. 159; and Culpeper's Case, cited in 2 Freem. 124. "These, however," it has been well said, "were extreme cases, showing, indeed, how partial equity is to a purchaser, but carrying the doctrine of protection further than it would be at the present day." 2 White & Tudor's Eq. Cas. 6; notes to Basset v. Notworthy; 2 Sugd. Vend. 1020. And it has been held that a purchaser "shall not protect himself by taking a conveyance from a trustee after he had notice of the trust; for by taking a conveyance with notice of the trust, he himself becomes the trustee, and must not, to get a plank to save himself, be guilty of a breach of trust." Saunders v. Dehew, 2 If, therefore, the appellant could be regarded as a Vern. 271. bona fide purchaser when he obtained the deed from Nisewander, he could derive no protection from that deed, which was obtained from a mere trustee of the legal title for Wohlford, and with full

knowledge on the part of the appellant of the existence of the Indeed, if he had then been a bona fide purchaser, he would not have needed the deed for his protection against Wohlford, who, in that case, would have been a purchaser with notice of his prior equity; but the appellant cannot be regarded as a purchaser at that time. He had received no conveyance, and paid only a part of the purchase-money. His purchase was never more than voidable, and had been avoided, and he ceased to have any equity in regard to the land; but Nisewander was left free to dispose of it as if he never had sold it to the appellant. So that Wohlford's purchase, though made with notice of the prior sale to the appellant, was entirely unaffected thereby, the same having been disaffirmed and avoided. And the appellant, having obtained the deed with full notice that the person from whom he obtained it was a mere trustee of the legal title for Wohlford, became himself a mere trustee of that title, and bound therefore to convey it to Wohlford's heirs. The Court is further of opinion, that any claim which the appellant may have on account of payments made under the original contract with him, or as a consideration for the execution of the said deed, is a personal claim against Nisewander, and cannot be enforced in this suit.

It has been already shown that the appellant has no interest in, or claim to, the land itself. Nor has he any in or to the purchase-money, if any, due by Wohlford. If he has he must have derived it from the deed. But that is a conveyance of the land, and not an assignment of the purchase-money. It is adversary to the sale to Wohlford and not in subordination to it. A claim founded thereon is in conflict with the specific execution of Wohlford's purchase, to which he is entitled, and which is the purpose of this suit. Such claim, therefore, cannot be enforced in this suit.

The Court is further of opinion that it sufficiently appears from the recital contained in the decree appealed from that the cause had been duly revived in the name of the heirs of Wohlford, Craig v. Sebrell, 9 Gratt. 181; but at all events, the appellant has no right to complain of any irregularity in that respect, the said decree being in the name and favor of said heirs, and they being parties to and defending this appeal. The Court is therefore of opinion, that there is no error in the said decree to the prejudice of the appellant. But the Court is further of opinion

Wohlford had been actually paid when the said decree was rendered though it had then become payable; and, as the said land was subject to a lien for so much of the said purchase-money as may then have remained unpaid, the said decree should have been without prejudice to such lien, and to any proceedings for the enforcement thereof, which the said Nisewander or his assigns might be advised to institute; and that the said decree should be amended in that respect, and as amended, affirmed.

Decree amended and affirmed.

HUBBARD & CUMMINGS.

(1 Maine, 11. Supreme Judicial Court of Maine, 1820.)

Rescission of Infants' Contracts in toto. — Confirmation.

In a case stated for the opinion of the Court, the parties agreed on the following facts: Jackson, the plaintiff's testator, being seised in fee of a certain lot of land, on the 9th day of August, 1815, conveyed it to one Dudley by deed with the usual covenants of warranty; and at the same time, as security for the purchase-money, took from Dudley a mortgage of the same land.

At the time of making these deeds Dudley was a minor. Afterwards, on the 10th day of October, 1816, Dudley, being of full age and remaining in possession of the land, for a valuable consideration conveyed it with warranty to Simeon Cummings and others; and they in like manner conveyed it to the tenant, against whom Jackson's executors brought this action to recover possession of the land as mortgaged to their testator.

Greenleaf, for the demandants, cited Zouch v. Parsons, 3 Burr. 1794; Co. Lit. 2 b, 51 b; Worcester v. Eaton, 13 Mass. 374; Com. Dig. "Enfant," C. 6, 8; Holbrook v. Finney, 4 Mass. 566; 8 Co. 42; Badger v. Phinney, 15 Mass. 359.

Fessenden, for the tenant, cited Keane v. Boycot, 2 H. Bl. 515; Taylor v. Croke, 4 Esp. 187; Willis v. Twambly, 13 Mass. 204; Boston Bank v. Chamberlain, 15 Mass. 220.

Mellen, C. J., delivered the opinion of the Court. It is agreed by the counsel on both sides that the deed of a minor is not absolutely void, but only voidable at the election of the minor after his arrival at full age. This principle of law is perfectly plain, and no authorities need be cited in support of it. But it is contended by the counsel for the tenant that the minor, after his arrival at full age, did avoid the mortgage deed made by him during his minority; and that the conveyance made by him, with warranty to Cummings and others, was an open and explicit disavowal and disaffirmance of the mortgage, and passed the fee of the estate to his grantees. The counsel for the demandants, on the other hand, contends that the deed from Jackson to Dudley and the mortgage back to Jackson form but one contract; and that the continuance of Dudley's possession of the premises, after he became of full age, amounted to an affirmance of the whole contract, on the principle that it must be affirmed or rescinded in toto; and that even the deed itself to Simeon Cummings and others may be considered as an affirmance of the first deed and mortgage. It is said that the promissory notes which were given for the purchase-money by the minor have not been paid nor put in suit; and that perhaps no objection will ever be made by Dudley to the payment, on account of his infancy at the time of signing them. Still, the defence made in this action, and the facts on which the tenant relies, show at once on which side of the case the justice of it is to be found. The principal question is, do the deed from Jackson to Dudley, and the mortgage to Jackson, in the circumstances under which they were executed, constitute one contract? If, in legal contemplation, they cannot be considered as distinct and independent contracts, but as only one contract, the application of a few acknowledged principles will lead to an easy and satisfactory decision. The common learning with respect to a mortgage may serve to illustrate the subject. It is well known to be wholly immaterial whether the condition annexed to such a conveyance be contained in the deed of conveyance, or in another instrument under seal, and executed at the same time, as Both deeds form but one contract. If A. convey a defeasance. lands to B. in fee, to the use of C., the wife of B. shall not be endowed of these lands; for the seisin of B. is only instantane-Co. Lit. 31 b; 2 Co. 77 a. The seisin for an instant is ous.

where the husband, by the same act or same conveyance by which he acquires the fee, parts with it. This principle is recognized in the case of Holbrook v. Finney, 4 Mass. 566, and in the cases there cited; and that case goes the length of establishing the doctrine contended for by the demandant's counsel, as to the construction to be given to a deed and mortgage back to the grantor, executed at the same time. In that case the Court say: "The mortgage back to the father, from the terms of it, is of the same date with the conveyance from him. They are therefore to be considered as parts of the same contract." And again: "The two instruments must be considered as parts of one and the same contract, between the parties, in the same manner as a deed of defeasance forms, with the deed to be defeated, but one contract, although engrossed on several sheets." We are satisfied with this decision and the reasons on which it is founded. In the case under consideration, the legal operation of the deed to and mortgage from Dudley was to convey an equity of redemption in the premises, and nothing more. Suppose a deed had been made by Jackson to Dudley, on condition to be void if Dudley should not, on a certain day, pay him a certain sum. In both cases he might acquire the absolute estate, by payment of the money according to the terms of the condition.

It was at the option of Dudley to confirm or rescind the bargain, on his arrival at full age; but he could not confirm it in part, and rescind it in part. Kimball v. Cunningham, 4 Mass. 502. This would be giving to the minor, not only the privilege of protecting himself, but the power of injuring others, without any legal accountability. We apprehend the law is not liable to this imputation. A minor is sufficiently protected from imposition and danger, if he may on arriving at full age rescind his contracts, and restore to his rights the person with whom he has contracted.

The case of Badger v. Phinney, cited by the counsel for the demandants, is full to this point. It is impossible not to perceive the sound sense as well as sound principles of that decision, and to feel its force when applied to the case before us. In that case the goods had been sold to a minor, who was supposed to be of full age at the time he gave his promissory notes for the value, and avoided them by the plea of infancy. The Court allowed the vendor to reclaim and hold the goods; and they went

even further; they said that as to the goods which the minor had sold, and for which he had received payment, he could never have reclaimed them, though he had disaffirmed the contract at full age, without restoring the price of the goods to the pur-In other words, the contract must be rescinded in toto. If affirmed in part, it is affirmed in the whole. The only question remaining is, whether Dudley, after he became of full age, did affirm the contract made with the testator. We have seen that he continued in possession of the lands until he sold to Cummings, which was some time after this arrival at full age; and that he claimed to hold the lands by virtue of Jackson's deed, inasmuch as he undertook to sell and convey them with warranty. If an infant make an agreement, and receive interest upon it after he is of full age, he confirms the agreement. Vern. 132. Or if he make an exchange of land, and after he is of full age continues in possession of the land received in exchange. 2 Vern. 225. So, if he purchase lands while under age, and continues in possession after his arrival at full age, it is an affirmance of the contract. Co. Lit. 3 a, 8; Com. Dig. "Enfant," C. 6; 2 Bulstr. 69; 2 Vent. 203; 3 Burr. 1710. On this point the authorities seem clear and decisive; the law is plain as the fact. The case of Boston Bank v. Chamberlain, which was cited by the counsel for the tenant, is not similar to the case now before us. In the case cited, both parties claimed under deeds from the same person; one deed being made during his minority, and the other after his arrival at full age. But it does not appear how or from whom the minor obtained his title; there was no question as to instantaneous seisin; nor the construction of two instruments as forming one contract only. Upon a full consideration of the case, we are all of opinion that the action is maintainable upon principles of law well established, and such as will protect an honest man from injury, as well as relieve a minor from the consequences of his indiscretion or incapacity in making contracts. This decision will do justice to the heirs or creditors of Jackson, and leave the tenant to seek his indemnity upon the covenants in the deed of Dudley, or his own immediate grantors.

Let judgment be entered for the demandants as on mortgage.

LAWSON v. LOVEJOY.

(8 Maine, 405. Supreme Judicial Court of Maine, 1832.)

Executory Contracts of Infants, how ratified.

Assumpsite by the indorsee against the maker of a promissory note. The defence was infancy; and the case was submitted to the determination of the Court upon the following facts: The note was given for the price of a yoke of oxen, sold by the payee to the maker, who at that time was an infant; but after his arrival at full age, which was after the maturity of the note, he "converted the oxen to his own use, and received the avails of the same."

D. Williams, for the plaintiff, cited 3 Maule & Selw. 481; 1 Pick. 124; 1 Vern. 132.

Boutelle, for the defendant, cited 16 Mass. 460; 1 Pick. 203, 223.

Parris, J., delivered the opinion of the Court. It seems to be a well-settled principle that such contracts of an infant as the Court can pronounce to be to his prejudice are void; such as are of an uncertain nature as to benefit or prejudice are voidable, and may be confirmed or avoided at his election; and such as are for his benefit, as for necessaries, instruction, and the like, are The law so far protects him, in the second class of contracts, as to afford him an opportunity, when arrived at full age, to consider his bargain, its probable tendency and effect; to review the circumstances under which it was made; and, having weighed its advantages and disadvantages, to ratify or avoid it. If it be ratified, the original contract becomes binding, and may The ratification gives life and validity to the old be enforced. promise; and, if the contract be enforced at law, it will be by an action on the original agreement, and not on the ratification. But a ratification must, on the one hand, be something more than a mere acknowledgment of the debt, while, on the other, it need not be a direct promise to pay or perform. A direct promise is, indeed, evidence of a ratification, but not the only evi-The contract of an infant may be rendered as valid, dence.

when he arrives at full age, by his mere acts, as by the most direct and unequivocal promise. His confirmation of the act or deed of his infancy may be justly inferred against him, after he has been of age for a reasonable time, either from his positive acts in favor of the contract, or from his tacit assent under circumstances not to excuse his silence. It was even said by Chief Justice Dallas, in Holmes v. Blogg, 8 Taunt. 35, that in every instance of a contract voidable only, by an infant on coming of age, the infant is bound to give notice of disaffirmance of such contract in reasonable time. Although this doctrine may not have been fully recognized to its utmost extent, yet such circumstances as show that the infant either received a benefit from the contract after he arrived at full age, or did something from which assent might be presumed, have frequently been adjudged sufficient evidence of a ratification. Such as the silence of the infant after his arrival at full age, coupled with his retaining possession of the consideration, or availing himself in any manner of his conveyance. Hubbard v. Cummings, 1 Greenl. 11; Dana v. Coombs, 6 Greenl. 89. So if an infant lease land, and after he come of age receive rent; this is equivalent to an express promise that the lease shall stand, and the infant is bound Ashfield v. Ashfield, Sir W. Jones, 157; Litt. sect. 258. So if an infant take a lease for years, rendering rent, which is in arrear for several years when he comes of age, and he thereafter continues in possession. This makes the lease good, and him chargeable with all the arrears which accrued during his minority; for though, at full age, he might have disaffirmed the lease, and thereby have avoided payment of the arrears, yet his continuance in possession after his full age ratifies and affirms the contract ab initio. Com. Dig. "Enfant," C. 6; Evelyn v. Chichester, 3 Burr. 1717. So receiving interest on a contract. Franklin v. Thornbury, 1 Vern. 132. The occupancy of lands taken in exchange for other land. Cecil v. Salisbury, 2 Vern. And any other act indicating an intention to affirm. Kline v. Beebe, 6 Conn. 494. The law wisely protects youth from the impositions of those who might be disposed to take advantage of their inexperience, and compels them to the performance of no engagements or the payment of no debts contracted within age, such as are for necessaries suited to their condition in life. But while it affords this protection as a

shield, it will not sanction its use as an offensive weapon of injustice, by which the unsuspecting and honest community are to be defrauded of their property. The privilege is afforded for no such purpose. The law requires of the infant the strict performance of his engagement, if, subsequent to his arrival at age, it has been ratified and confirmed, either by a new promise, or by any act by which an acquiescence is implied. But if there have been no such ratification, and he repudiate the contract, common honesty will not, and legal principles ought not, to permit him to retain the consideration which was the foundation of the promise he thus avoids. He should place himself and the person with whom he contracted in the same situation as if no contract had been made. Surely he ought not to be permitted to keep all and pay nothing. But in this case we are not called upon to decide whether the law would afford any remedy for one who had sold his chattels to an infant, by whom they had been converted into cash during infancy, there having been no subsequent confirmation of the contract. If the principles which have been recognized by this Court in Hubbard v. Cummings and Dana v. Coombs stand unshaken, as we think they do, and can be applied to contracts for personal as well as real property, as we think they may, the contract which is the foundation of this action was fully ratified by the acts of the defendant after he arrived at full age. According to the agreement of the parties, the defendant must be defaulted.

HALE v. GERRISH.

(8 N. H. 374. Superior Court of Judicature of New Hampshire, 1836.)

Ratification of Executory Contract.

Assumpsit upon an account annexed to the plaintiff's writ. Plea, infancy. Replication, that the defendant, after he became of full age, assented to, ratified, and confirmed the several promises mentioned in the declaration, with a traverse and issue on this fact. The case was submitted to the Court on the evidence contained in the depositions of Enoch H. Nutter and John

Brewster; and it was agreed that if the said depositions furnished evidence competent to be submitted to a jury, and sufficient in law to justify them in returning a verdict for the plaintiff, judgment was to be rendered for the plaintiff for the amount of his demand; otherwise for the defendant. The said Nutter testified that he bailed the defendant on the plaintiff's writ, and that since that time he had heard the defendant say that he owed the debt to the plaintiff, and was willing to pay him as much as he paid his other creditors, if the plaintiff would settle with him, and do what was right; at the same time, he said he was a minor when the debt was contracted. He also said he would pay the plaintiff fifty per cent of the debt, if he would pay the cost, rather than have the action go to Court. Said Brewster testified that for several years he had been employed as a clerk in the store of the plaintiff, in Dover; that, on the 11th day of June, 1834, the defendant was passing the store, and was called in for the purpose of settling an account which the plaintiff had against him. The plaintiff directed the witness to make out the account, which he did. The plaintiff then requested the defendant to give his note for the amount of the account; but he refused. The plaintiff then asked him why he would not; and the defendant answered, because it would render him liable to be arrested.

The plaintiff asked the defendant if he owed the debt. He replied, "Yes, I owe the debt, and you will get your pay; and I suppose that is all you want."

The plaintiff said, "Yes; but I want the account settled, as it is upon an old book." The defendant said he should not give a note, on any consideration. He farther said that he had made arrangements to pay all his small debts: and should do it before he went to New York.

Bartlett, for the plaintiff.

Rowe, for the defendant.

UPHAM, J. It has been settled, in the case of Merriam v. Wilkins, 6 N. H. 432, that, where infancy is pleaded, a new promise, made after the commencement of a suit, is not sufficient to sustain a pending action. There must be a subsisting right of action at the time of suing out the plaintiff's writ, which right of action no subsequent promise can give. The testimony, therefore, of Enoch H. Nutter is insufficient to show a new promise

that can avail the plaintiff in this suit. The declarations to Nutter were all subsequent to the commencement of this action and to the arrest of the defendant, for whom Nutter became bail. Thrupp v. Fielder, 2 Esp. 628; Ford v. Phillips, 1 Pick. 203; Thornton v. Illingworth, 2 B. & C. 824. The whole case, then, rests upon the testimony of John Brewster, the remaining wit-He testifies that the plaintiff called the defendant into his store, and asked him to give his note for the amount of the account, which the defendant refused to do, saying it would render him liable to be arrested. The plaintiff asked the defendant "if he did not owe the debt." The defendant replied "that he did, and that the plaintiff would get his pay," and added, "I suppose this is all you want." He farther said that he had made arrangements to pay all his small debts before he went to New The rule in this case is different from that where the statute of limitations is pleaded. An acknowledgment of a subsisting debt, where a claim has been barred by the statute of limitations, furnishes evidence, unless explained or qualified, from which a new promise may be implied; but the promise of an infant cannot be revived so as to sustain an action, unless there be an express confirmation or ratification after he comes of age. This ratification must either be a direct promise, — as by saying, "I ratify and confirm," or, "I agree to pay the debt," or by positive acts of the infant, after he has been of age a reasonable time, in favor of his contract, which are of a character to constitute as perfect evidence of a ratification as an express and unequivocal promise. Thompson v. Lay, 4 Pick. 48; Lawson v. Lovejoy, 8 Green. 405; Ford v. Phillips, 1 Pick. 202; Smith v. Mayo, 9 Mass. 62; Roberts v. Wiggin, 1 N. H. 73; Whitney v. Dutch, 14 Mass. 457; Goodsell v. Myers, 3 Wend. 479; Hubbard v. Cummings, 1 Green. 11; Dana v. Coombs, 6 Green. 89; Thrupp v. Fielder, 2 Esp. 628; Hitchcock v. Tyson, Id. 482. 1 Pick. 202, the declaration of the defendant after he had become of age was, "that he owed the plaintiff, but was unable to pay him; he would endeavor, however, to get his brother to be bound with him." It was holden, that this did not amount to a renewal of the promise. The declaration, in this case, that the defendant "owed the debt, and that the plaintiff would get his pay," scems to go no farther. Were this the whole declaration, it would probably not constitute such a ratification of the original

contract as to bind the defendant; but this declaration was at the time accompanied by an avowed design on his part to make no promise or acknowledgment that would render him liable to be arrested, or that would enable the plaintiff to enforce the claim. Such being the case, it seems perfectly clear that there was no such ratification or new promise as would render the defendant, liable.

Judgment for the defendant.

JENNINGS v. RUNDALL

(8 Term, 385. Court of King's Bench, 1799.)

Liability of Infant in an Action founded upon Contract, though in form ex delicto.

The first count in this declaration stated that the plaintiff, on, &c., at the instance and request of the defendant, delivered to the defendant a certain mare of the plaintiff, to be moderately ridden by the defendant; yet that the defendant, contriving and maliciously intending to injure the plaintiff whilst the mare was in the defendant's custody under such delivery, and before the mare was returned to the plaintiff on, &c., wrongfully and injuriously rode, used, and worked the said mare in so immoderate, excessive, and improper a manner, and took so little and such bad care thereof that, by reason of such immoderate, &c., riding, &c., the said mare became, and was greatly strained, damaged, &c.

In the second count it was alleged, that the plaintiff at the instance and request of the defendant let to hire, and delivered to the defendant, a certain other mare, to go and perform a certain reasonable and moderate journey, &c., yet that the defendant contriving, &c., wrongfully and injuriously rode and worked the said mare a much longer journey, &c.

There was also a count in trover for two mares.

The defendant pleaded his infancy to the two first counts, to which plea the plaintiff demurred.

Marryat, in support of the demurrer (after observing that it was immaterial whether or not infancy could be pleaded to the

second count, because, it being pleaded to both counts, if it was a bad plea as to either count, the whole plea was bad), contended that, as the first count was not founded on a contract, but on a tort, the defendant could not plead infancy to it. That, that count did not state any consideration for the delivery of the mare by the plaintiff to the defendant, or any promise by the defendant to take care of her, or to redeliver her; but that it appears to be a delivery on bail to the defendant, who had abused the plaintiff's property.

That the tort here did not consist in mere neglect or omission, but in a tortious act done by the defendant.

That the dictum in the books, that, if the action arise out of the contract, the plaintiff shall not, by declaring in tort, prevent the defendant pleading infancy, must be confined to cases where the wrong complained of consists in omission, or in some act which is a tort only by construction of law.

That such was the ground of decision in Grove v. Nevill, 1 Keb. 778 (said in 1 Keb. 913, 914, to have been decided); where in an action upon the case in nature of a deceit on sale by the defendant of goods as his own, when in truth they belonged to another, the Court said, "This is no actual tort, or any thing ex delicto, but only ex contractu." That in Johnson v. Pie;1 where the defendant had falsely and fraudulently asserted himself to be of full age, and had, as such, executed a mortgage to the plaintiff, and where it was holden that the defendant, an infant, was not answerable, the action was founded on the very contract in which the defendant had cheated the plaintiff: whereas here is a tortious act done by the defendant, and that, too, subsequent to the time when any supposed contract could have been entered into respecting the hire of the mare. observed, that an infant is answerable in an action for slander, Noy, 129; because there an act is done by the defendant; and in that case it was said that malitia supplet ætatem; so here malice is laid. That in trover an infant is also responsible, on account of the wrongful conversion subsequent to the bailment; though in most instances in trover the act is only a breach of trust, or violation of duty; and that, even in an action of trespass for mesne profit, he cannot plead infancy, though there he becomes a trespasser by construction of law.

¹ 1 Keb. 905, 913, and 1 Lev. 169.

That, if an infant wilfully destroyed any thing that had been bailed to him, there is no doubt but that he would be liable in an action for the tort; and that this was in effect the same, because here he rendered a mare, that had been bailed to him, less valuable by his wrongful and injurious act.

Wood, contra, was stopped by the Court.

Lord Kenyon, C. J. The law of England has very wisely protected infants against their liability in cases of contract; and the present case is a strong instance to show the wisdom of that law. The defendant, a lad, wished to ride the plaintiff's mare a short journey; the plaintiff lent him the mare to hire; and in the course of the journey an accident happened, the mare being strained; and the question is, whether this action can be maintained.

I am clearly of opinion that it cannot: it is founded on a contract. If it were in the power of a plaintiff to convert that which arises out of a contract into a tort, there would be an end of that protection which the law affords to infants. Lord Mansfield, indeed, frequently said that this protection was to be used as a shield, and not as a sword; and, therefore, if an infant commit an assault, or utter slander, God forbid that he should not be answerable for it in a Court of justice.

But where an infant has made an improvident contract with a person who has been wicked enough to contract with him, such person cannot resort to a Court of law to enforce such contract. And the words, "wrongfully, injuriously, and maliciously," introduced into this declaration cannot vary the case.

GROSE, J. I am of the same opinion. In the case of Manby v. Scott, this distinction was taken, that, if the action against an infant be grounded on a contract, the plaintiff shall not convert it into a tort. "If one deliver goods to an infant on a contract, knowing him to be an infant, the infant shall not be charged for them in trover and conversion; for by that means all infants in England would be ruined." A very few years after the decision of that case, the case of Johnson v. Pye arose, according to one report of which Lord C. J. KEELING expressed great indignation at the attempt to charge an infant in tort, for

that which was the foundation of an action of assumpsit. He said, "The judgment shall stay forever, else the whole foundation of the common law will be shaken; for this was but a slip, and he might have pleaded his minority here."

LAWRENCE, J. The true distinction is that mentioned by my Brother Grose, and not that stated at the bar, between negligence and an act done by the infant. It is argued, that if no act be done by the infant he may plead his infancy, but that infancy is not a defence where an act has been done. If that were so, an infant would not be liable in many instances of trover, where the conversion consists merely in a non-delivery; and yet in trover an infant is always liable. According to the same rule, if an action were brought against an infant for negligently keeping the plaintiff's cattle, by which they died, infancy might be pleaded in bar; but if the declaration charged the defendant with having given the cattle bad food, by which they died, it could not. But this certainly is not the true distinction.

LE BLANC, J. The plea of infancy is a good bar to this action, on the ground that the act done in this case is the foundation of an action of assumpsit. And the reason of the distinction taken in the case in Siderfin is, that the plaintiff shall not, by changing the form of the action, vary the liability of the infant.

Now, if the plaintiff could not have maintained an action of assumpsit against the infant, neither can he maintain the action in its present form. On this short ground, therefore, I think the plea of infancy is a good defence to this action.

Judgment for the defendant.

Homer v. Thwing.

(3 Pick. 492. Supreme Judicial Court of Massachusetts, 1826.)

Liability of Infant when Action sounds in Tort.

TROVER for a horse. One of the defendants was defaulted. Thwing, who was an infant, defended by guardian.

The plaintiff offered evidence that the horse was let by him to the defendants to drive in a chaise to the Punch Bowl, in Brookline, and that they went to Fresh Pond in Cambridge without leave; and afterwards to the Punch Bowl; and that the horse was returned much injured. The counsel for Thwing contended, that as this was a transaction arising originally on contract, in which the infancy of Thwing would have been a good defence, the plaintiff should not recover upon the same facts by changing the form of his action to tort. But the jury were instructed, for the purposes of this trial, that the action would lie against Thwing, notwithstanding his infancy; and a verdict was returned for the plaintiff.

If the Court should be of opinion that the instruction to the jury was wrong, the plaintiff was to be nonsuited; but, otherwise, judgment was to be entered according to the verdict.

Dunlap now insisted upon the objection made at the trial. Jennings v. Rundall, 8 T. R. 335, is decisive of this case.

The wrong here arises out of a contract belonging to the third class of bailments in Coggs v. Bernard, 2 Ld. Raym. 913; but the wrong for which infants are responsible must arise wholly ex delicto. Johnson v. Pie, 1 Lev. 169, and 1 Keb. 905, 913. If the facts here would furnish a good defence to an action on the contract, they will to an action of tort; for the Court will look at the substance, rather than the form, of the action. Bristow v. Eastman, 1 Esp. 172, s. c. Peake's Cas. 222; Manby v. Scott, 1 Sid. 129. In Jennings v. Rundall, it is said that trover will lie against an infant; but that must be where his conduct is wholly tortious. That was an action against an infant for riding immoderately a mare which had been delivered to him to be moderately ridden, and the declaration contained a

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count in trover; and yet the action could not be sustained. See also 1 Dane's Abr. 143; 1 Chit. Pl. 65; 1 Pothier on Oblig. 71.

The only case which seems to have a contrary bearing is that of Wheelock v. Wheelwright, 5 Mass. 104. That case was decided without any allusion to the distinction now taken in respect to an infant, that his acts must be wholly tortious to sustain an action.

In the case at bar there was only a constructive tort, for which an infant is not liable.

S. D. Parker, for the plaintiff, relied on the case last cited, of Wheelock v. Wheelwright.

Morton, J., delivered the opinion of the Court. The defence in this case is infancy. It is contended that this action is founded in contract, and that the defendant cannot be ousted of this defence by changing the form of action from contract to Infants are liable in actions arising ex delicto, but not in those arising ex contractu. The defendant, however, contends, that there is a qualification of this rule; and that infants are liable for positive wrongs only, and not for constructive torts. But we know of no such distinction; and in the case of Jennings v. Rundall, so much relied upon by the defendants' counsel, it is expressly rejected. It is true that an infant cannot become a trespasser by any prior or subsequent consent; but he may be guilty of torts, as well by omissions of duty as by the commission of positive wrongs. 1 Chit. Pl. 65 (6 Amer. ed. 87); Co. Lit. 180 b, Butler's note, 56. He is also liable for frauds as well as for And his liability is to be determined by the real nature of the transaction, and not by the form of the action. Abr. 143; 1 Esp. 172. Although an infant shall not be charged in trover for goods sold to him with a knowledge of his infancy (Manby v. Scott, 1 Sid. 129), and although an action will not lie against an infant for affirming himself to be of full age in the execution of a contract (Johnson v. Pie, 1 Lev. 169, and 1 Keb. 905), yet detinue will lie against an infant for goods delivered upon a special contract, for a specific purpose, after the contract is avoided, Mills v. Graham, 1 New Rep. 140; and assumpsit will lie against an infant for money embezzled; for the Court will look through the form of the action into the tortious nature of the transaction, 1 Esp. 172. It has been holden, that trover will not lie against an infant for immoderately using a horse which he had contracted to use moderately, on the ground that the action could only be supported upon the contract. Jennings v. Rundall, before cited. But, in the case at bar, the driving of the horse beyond the place to which the defendant had permission to go, was a conversion; and trover is the proper remedy.

In the case of Wheelock v. Wheelwright, 5 Mass. 104, which, in the facts as well as the principles, is similar to this, it was decided, not only that case for improperly using the horse would not, but that trover was the only action which would, lie. Whenever trover is the proper form of action, it will lie against an infant. The defence therefore is insufficient, and judgment must be entered on the verdict.

Penrose v. Curren.

(8 Rawle, 351. Supreme Court of Pennsylvania, 1832.)

Liability of Infant when Action sounds in Contract.

On a writ of error to the District Court for the city and county of Philadelphia. This appeared to be an action on the case brought by William Curren, the defendant in error, against Samuel Penrose, who appeared by his guardian Randall Hutchinson, in which the plaintiff below filed the following statement: "On Saturday the 2d day of June, 1827, the defendant hired from the plaintiff a horse and gig, to go to Germantown on the following day. On the following day, to wit, June 3, 1827, the defendant took the said horse and gig, and rode and drove to Chester in Delaware County, and to other places to the plaintiff unknown; and, by hard, severe, unnecessary, and cruel driving and treatment, killed the said horse, on the said 3d day of June, The plaintiff's claim is for this injury to his property, and he claims damages in the sum of one hundred and twentyfive dollars." The defendant pleaded "infancy," and that "he is not guilty of the supposed grievances laid to his charge," &c.

The jury returned a special verdict, by which they found, that all the allegations contained and set forth in the plaintiff's

statement of his cause of action were true; and that the defendant, at the time of committing the said trespass mentioned in the said statement, was under the age of twenty-one years. If the Court should be of opinion that the defendant was legally responsible in this form of action, and under these facts, the jury found for the plaintiff, and assessed the damages at one hundred and twenty-five dollars, with six cents costs; and, if otherwise, they found for the defendant.

On this special verdict, the District Court gave judgment for the plaintiff below.

Bouvier, for the plaintiff in error. The statement filed by the plaintiff below, which is in the nature of a declaration, is upon a contract for hiring a horse, to be returned to the owner; which the defendant failed to do, but killed him by hard driving. Upon the contract the defendant was not liable, being in his minority, and the subject-matter of the contract not being necessaries furnished to him. The plaintiff now attempts to render the infant liable, by converting an action ex contractu into an This he cannot do. Where goods are delivaction ex delicto. ered to an infant, knowing him to be such, trover cannot be maintained. Manby v. Scott, 1 Sid. 129. So where a plaintiff declared, that, at the defendant's request, he had delivered to him a mare to be moderately ridden; and that the defendant, maliciously intending, &c., wrongfully and injuriously rode the mare, so that she was damaged, &c. it was held that the defendant might plead his infancy in bar, the action being founded on a contract. Jennings v. Rundall, 8 T. R. 335. defendant, being an infant, affirmed himself to be of full age, by which means he obtained a loan of one hundred pounds of the plaintiff. After verdict for the plaintiff, on not guilty pleaded, the judgment was arrested. Johnson v. Pie, 1 Keb. 905, 913; s. c. 1 Sid. 258; 1 Lev. 168. An infant cannot be made a trespasser either by a prior command or subsequent assent. Litt. 180 b, note 4. It is against the policy of the law to make an infant liable upon a contract, except for necessaries, and the law will not permit it to be done indirectly by converting the contract into a tort. Curtin v. Patton, 11 Serg. & Rawle, 310; 1 Com on Cont. 150, 151; Schenk v. Strong, 1 Southard, 87.

Brewster, for the defendant in error. If an action such as this cannot be maintained by the English Courts, it can in those of

Pennsylvania. In England the Courts uniformly favor infants, perhaps to preserve wealth in particular families, a reason which can have no influence here. The case in Southard was decided on the ground that the carriage was broken by accident, which distinguishes it in an essential manner from the case at bar, the basis of which is fraud and tort.

There was fraud in the inception of the contract; and the defendant cannot shelter himself under the form of contract, to avoid the consequences of the fraud. Infants are liable for deceit, though in form the action is on a contract; assumpsit will lie against an infant for money embezzled by him. So an action may be maintained against an infant on a warranty of a horse. The Court will look through the form, in order to get at the merits of the case. Wood v. Vance, 1 Nott & McCord, 197; Homer v. Thwing, 3 Pick. 492; Vasse v. Smith, 6 Cranch, 226.

The opinion of the Court was delivered by

ROGERS, J. The law has wisely provided that infants shall not be liable on contracts, except for necessaries.

It cannot be pretended that here the infant would be liable on the contract of hiring, as the plaintiff has not brought his case within the principle of the exception. The plaintiff rests his right to recover on the fact, that the minor was guilty of a conversion by riding to Chester instead of Germantown. He contends that, wherever trover is the proper form of action, it will lie as well against an infant as an adult; and in this position it must be admitted, he is supported by a decision of a Court of high authority in Homer v. Thwing, 3 Pick. 492. I have examined that case with the attention it merits, and I am compelled to say, I cannot agree to the principle which is there It is true that detinue will lie against an infant for goods delivered upon a special contract, for a specific purpose, after the contract is avoided. It is also true that assumpsit will lie against an infant to recover money embezzled. To this I fully accede; because the object of the suit, in the first case, is to recover the article itself, or damages for its detention. this decision is founded in sheer justice, as the privilege of protection is given to the minor as a shield, and not as a sword; nor is it necessary for his safety that he could be permitted to retain the article when the contract has been rescinded, without

paying an equivalent for it. The vendor is remitted to his original rights when the contract has been rescinded; and, as a consequence, he may assert them either by action of detinue, replevin, or trover. It is also altogether proper that money embezzled by an infant should be recovered in assumpsit. occupation in which he is employed is for the benefit of the infant; and the embezzlement is a tortious act, in which no blame is imputable to the employer. But is that the case here? The infant derives no benefit from the transaction; and, what is of more consequence, the plaintiff himself is in fault. The loss which ensues results from the contract of hiring with a person whom he is bound to know was a minor, and as such incapable of contracting. This is a transaction in which parents and guardians have a deep interest, and particularly such as educate their children from under their own eye, at a distance, in our seminaries of learning. It amounts to this: If the keeper of a livery-stable, or an innkeeper, whose business it is to let out horses and carriages to hire, chooses to trust them to a minor, contrary to the assent and wish of the parent, and an injury is done by the young man, in the folly and heedlessness of youth, going to a different place or farther than he intended, the father must either pay the debt or damages, to whatever amount they may be, or suffer his child to be disgraced by imprisonment. seems to me that parents would have much reason to complain of a rule which involves such consequences. If the plaintiff should succeed, there would be no want of pretences upon which infants might be charged, and there would be an end to the protection which the law so wisely affords them. I cannot agree that, from the commission of a wrong, a right of action can If the contract of hiring came within the exception of arise. necessaries, as might be where a horse was hired to visit a sick parent, &c., then the infant would be liable for the consequences; and, if injury ensued from cruel driving or improper treatment, the owner would have an appropriate remedy. Had the minor gone to Germantown, as he intended, then Schenk v. Strong, 1 Southard, 87, would have been express authority adverse to the plaintiff's claim. The foundation of the action is contract, and, disguise it as you may, it is an attempt to convert a suit originally in contract into a constructive tort, so as to charge the infant. So far are minors shielded from the consequences of their own acts, that action will not lie against them where they affirm themselves to be of full age, nor on a warranty in the sale of a horse. Johnson v. Pie, 1 Lev. 169; 1 Keble, 905. Nor will, I apprehend, trover lie against an infant for goods sold to him, either with or without a knowledge of his infancy; certainly not where he knows the fact of infancy. Manby v. Scott, 1 Sid. 129. The contract being unlawful, no action arises to the adult, who is bound to know with whom he is contracting, and must be aware that such contracts are contrary to the policy of the law. It operates not only as a shield to the infant, but as a penalty upon the adult.

Wherever a person has not parted with the property, then he can assert his right, as well against an infant as an adult, as in every kind of bailment; and, if the conversion had been the nondelivery of the horse and carriage hired, the owner might have sustained detinue, replevin, or trover. I would here remark, that, notwithstanding what is said in Homer v. Thwing, I cannot distinguish this from Jennings v. Rundall, 8 T. R. 335. In the second count of the declaration, it was alleged that the plaintiff let to hire and delivered to the defendant a certain other mare, to go and perform a certain reasonable and moderate journey, &c.; and yet that the defendant, contriving, &c., wrongfully and injuriously rode and worked the said mare a much longer journey, &c. The defendant pleaded infancy to both counts, to which the plaintiff demurred. Here, then, there was the constructive conversion of the property, which is the turning-point of the decision in Homer v. Thwing; and yet the Court, notwithstanding, gave judgment for the defendant.

The fundamental error seems to me to consist in considering the conduct of the infant as a violation of contract, whereas there was no contract which could be enforced.

Judgment reversed, and judgment for the defendant.

VASSE v. SMITH.

(6 Cranch, 226. Supreme Court of the United States, 1810.)

Plea of Infancy. — Effect of, in Actions ex delicto. — Infant's Liability in Trover.

Error to the Circuit Court for the District of Columbia.

The declaration had two counts: 1st, a special count, charging the defendant Smith, who was a supercargo, with breach of orders; 2d, trover. The first count stated that Vasse, the plaintiff, was owner and possessed of seventy barrels of flour, and, at the instance and request of the defendant, put it on board a schooner at Alexandria, to be shipped to Norfolk, under the care, management, and direction of the defendant, to be by him sold for and on account of the plaintiff, at Norfolk, for cash, or on a credit at sixty days, in good drafts on Alexandria, and negotiable in the Bank of Alexandria. That the defendant was retained and employed by the plaintiff for the purpose of selling the flour as aforesaid, for which service the plaintiff was to pay him a reasonable compensation.

That the defendant received the flour at Alexandria, put it on board the schooner, and sailed, with the flour under his care and direction, to Norfolk: "yet the defendant, not regarding the duty of his said employment, so badly, carelessly, negligently, and improvidently behaved himself in said service and employment, and took such little care of the said flour by him so received as aforesaid, that he did not sell the same, or any part thereof, at Norfolk, for cash, or on a credit of sixty days for drafts on Alexandria, negotiable in the Bank of Alexandria; but the said defendant, on the contrary thereof, by and through his own neglect and default, and through his wrongful conduct, carelessness, and improvidence, suffered the same and every part of the said seventy barrels of flour, in his possession as aforesaid, to be embezzled, or otherwise to be wholly lost, wasted, and destroyed."

The second count was a common count in trover for the flour. The defendant, besides the plea of not guilty, pleaded infancy to both counts; to which last plea the plaintiff demurred generally. The Court below rendered judgment for the defendant upon the demurrer to the plea of infancy to the first count; and for the plaintiff, upon the demurrer to that plea to the second count. Upon the trial, in the Court below, of the issue of not guilty to the count for trover, three bills of exceptions were taken by the plaintiff. The first bill of exceptions stated that the defendant offered evidence to prove that the flour was consigned and delivered to the defendant by the plaintiff, under the following letter of instructions:—

"MR. SAMUEL SMITH:

SIR,—I have shipped on board the schooner 'Sisters,' Captain—, bound to Norfolk, seventy barrels of superfine flour; marked A. V., to you consigned. As soon as you arrive there, I will be obliged to you to dispose of it as soon as you can, to the best advantage, for cash, or credit at sixty days in a good draft on this place, negotiable at the Bank of Alexandria. I should prefer the first, if not much difference. However, do for the best of my interest."

(Signed) "AMB. VASSE."

And that the defendant received the flour in consequence of that letter of instructions, and upon the terms therein mentioned. That the flour was not sold by the defendant at Norfolk; but was shipped from thence by him, without other authority than the said letter of instructions, to the West Indies, for and on account of one Joseph Smith, as stated in the bill of lading, which was for three hundred and ninety-eight barrels, seventy of which were stated in the margin to be marked A. V., 198 I. S., 100 D. I. S., and 30 P. T. That the defendant, when he received the flour, and long after he shipped it, was an infant under the age of twenty-one years. Whereupon the Court at the prayer of the defendant instructed the jury that if they found the facts as stated, the defendant was not liable upon the court for trover.

The second exception was the admission of evidence of the defendant's infancy.

The third exception stated that "upon the facts aforesaid [the facts in the first bill of exceptions mentioned], the plaintiff prayed the Court to instruct the jury that, if they shall be of

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opinion that the defendant was under the age of twenty-one years and between the age of nineteen and twenty years; and that the defendant of his own head shipped the flour to the West Indies, in a vessel which has been lost by the perils of the sea; and that the said shipment was made with other flour, on account of his father, Joseph Smith, — in such case the defendant has thereby committed a tort in regard to the plaintiff, for which he is liable in this action notwithstanding his infancy aforesaid; which instruction the Court refused to give. The verdict and judgment being against the plaintiff, he brought his writ of error.

E. F. Lee and C. Lee, for the plaintiff in error. Swann, contra.

MARSHALL, C. J., delivered the opinion of the Court, as follows: The first error alleged in this record consists in sustaining the plea of infancy to the first count in the declaration. count states a contract between the plaintiff and defendant, by which the plaintiff committed seventy barrels of flour to the care of the defendant, to be carried to Norfolk and there sold for money, or on sixty days' credit payable in drafts on Alexandria, negotiable in the bank. The plaintiff then alleges that the defendant did not perform his duty in selling conformably to his instructions; but, by his negligence, permitted the flour to be wasted so that it was lost to the plaintiff. This case, as stated, is completely a case of contract, and exhibits no feature of such a tort as will charge an infant. There can be no doubt but that the Court did right in sustaining the plea. The second count is in trover, and charges a conversion of the flour. That an infant is liable for a conversion is not contested. The Circuit Court was itself of that opinion, and therefore sustained the demurrer to this plea. But, in the progress of the cause, it appeared that the goods were not taken wrongfully by the defendant, but were committed to his care by the plaintiff; and that the conversion, if made, was made while they were in his custody under a con-The Court then permitted infancy to be given in evidence tract. on the plea of not guilty. To this opinion an exception was If infancy was a bar to a suit of trover brought in such taken. a case, the Court can perceive no reason why it may not be given in evidence on this plea. If it may be given in evidence on non-assumpsit, because the infant cannot contract, with at

least as equal reason may it be given in evidence in an action of trover in a case in which he cannot convert.

But this Court is of opinion that infancy is no complete bar to an action of trover, although the goods converted be in his possession, in virtue of a previous contract. The conversion is still in its nature a tort: it is not an act of omission, but of commission, and is within that class of offences for which infancy cannot afford protection. Yet it may be given in evidence; for it may have some influence on the question, whether the act complained of be really a conversion or not. The Court, therefore, does not consider the admission of this testimony as error. defendant exhibited the letter of instructions under which he acted, which is in these words: "Sir," &c.; but the plaintiff offered evidence that the flour was not sold in Norfolk, but was shipped by the defendant to the West Indies, for and on account of a certain Joseph Smith, as by the bill of lading which was produced. The defendant then gave his infancy in evidence, and prayed the Court to instruct the jury that, if they believed the testimony, he was not liable on the second count stated in the plaintiff's declaration, which instruction the Court gave, and to this opinion an exception was taken.

This instruction of the Court must have been founded on the opinion that infancy is a bar to an action of trover for goods committed to the infant under a contract, or that the fact proved did not amount to a conversion. This Court has already stated its opinion to be, that an infant is chargeable with a conversion, although it be of goods which came lawfully to his possession. It remains to inquire whether this is so clearly shown not to be a conversion as to justify the Court in saying to the jury the defendant was not liable in this action. The proof offered was that the defendant shipped the goods on account of Joseph This fact, standing unconnected with any other, would Smith. unquestionably be testimony which, if not conclusive in favor of the plaintiff, was at least proper to be left to the jury. But it is urged that this statement refers to the bill of lading, from the notes in the margin of which it appears that, although the bill of lading, which was for a much larger quantity of flour, was made out in the name of Joseph Smith, yet, in point of fact, the shipment was made for various persons, and among others for the plaintiff.

The Court perceive in this bill of exceptions no evidence explanatory of the terms under which this shipment was made; and the marks in the margin of the bill of lading do not, in themselves, prove that the shipment was not made for the person in whose name the bill was filled up. It is possible that it may have been proved to the jury that this flour was really intended to be shipped on account of the plaintiff, and that the defendant did not mean to convert it to his own use. But the letter did not authorize him so to act. It was not, therefore, a complete discharge; and, should it be admitted that an infant is not chargeable with a conversion made by mistake, this testimony ought still to have been left to the jury. The defendant would certainly be at liberty to prove that the shipment was in fact made for Vasse, and that he acquiesced in it so far as to consider the transaction not as a conversion; but, without any of these circumstances which, if given in evidence, ought to have been left to the jury, the Court has declared the action not sus-This Court is of opinion that the Circuit Court has erred in directing the jury that, upon the evidence given, the defendant was not liable under the second count; for which their judgment is to be reversed, and the cause remanded for further proceedings.1

JOHNSON v. PIE.

(1 Levinz, 169. Court of King's Bench, 1665.)

An infant, quære, if chargeable in an action for a false affirmation, whereby one is deceived.

CASE, for that the defendant, being an infant, affirmed himself to be of full age, and by means thereof the plaintiff lent him 100l., and so he had cheated the plaintiff by this false affirmation. After verdict for the plaintiff on not guilty, and 100l.

¹ The Chief Justice noticed also the phraseology of the third bill of exceptions. It prays the opinion of the Court upon certain facts, without stating that any evidence of those facts was given to the jury. It is doubtful whether those facts exist in the case, and whether the Court would be bound to give an opinion upon them.

damages, 't was moved in arrest of judgment that the action would not lie for this false affirmation. But the plaintiff ought to have informed himself by others, and cited Grove and Nevill's case, to be adjudged in this Court in Easter Term 16 Car. II. Rot. 400; where, in case against an infant for selling a false jewel, affirming it to be a true one, 't was adjudged the action did not lie; to which 't was answered, that this is a trespass on the case, and an infant is chargeable for trespass, though not for contracts. Kelynge and Wyndham held that the action did not lie, because the affirmation, being by an infant, was void: and it is not like to trespass, felony, &c.; for there is a fact done. Twysden doubted, for that infants are chargeable for trespasses (Dyer, 105); and so if he cheat with false dice, &c. But 't was adjourned. But see 1 Keb. 905, 913.1

Judgment arrested.

GILSON v. SPEAR.

(38 Vt. 311. Supreme Court of Vermont, 1865.)

Infant, when liable for Fraud. — An Action on the Case for Deceit in the sale of a horse.

This is an action on the case for deceit, or fraudulent concealment of unsoundness, in the sale of a horse. The plaintiff in his declaration alleged that, on the 1st of April, 1863, he purchased of the defendant a horse for the price of one hundred and fifteen dollars, as and for a sound horse: and that the defendant, at the time of the sale, to induce the plaintiff to give this price, affirmed that the horse "was sound, wind and limb, and free from any defect whatever, but refused to warrant the same;" whereas, the horse at that time in fact was unsound, and then and for a long time before had an incurable disease called the heaves, and was lame; all which was well known to the defendant; and that the defendant, intending to cheat and defraud the plaintiff, concealed this disease and lameness from him, and he, the plaintiff, was wholly ignorant of the same; and that by

reason of the same the horse is rendered worthless; and the plaintiff averred in his declaration that he has offered to return the horse to the defendant and receive back the purchase-money given for the same, which offer was refused by the defendant. The defendant plead in the county Court to this declaration: (1), not guilty; and (2), that, at the time of the sale of the horse to the plaintiff, he, the defendant, was an infant within the age of twenty-one years, to wit, of the age of twenty years, concluding with a verification. The plaintiff joined issue on the first plea, and demurred to the second plea. At the December Term, 1865, Windsor County Court, Barrett, J., presiding, the demurrer was pro forma overruled, and the plea of infancy was adjudged sufficient, and judgment was thereon rendered in favor of the defendant. To this decision and judgment the plaintiff excepted.

J. J. Wilson and A. P. Hunton for the plaintiff.

Hutchinson & Rowell, for the defendant.

The opinion of the Court was delivered by

Kellogg, J. The sole question in this case is whether an action on the case for deceit in the sale of a horse can be sustained against an infant; and, in considering this question, the facts alleged in the plaintiff's declaration are to be treated as admitted by the demurrer. It is an admitted general principle that an infant is liable in actions ex delicto for positive wrongs and constructive torts or frauds; and it is equally well settled that, where the substantial ground of action is contract, a plaintiff cannot, by declaring in tort, render a person liable who would not have been liable on his contract. Whether the fraud in this case should render the defendant liable to an action ex delicto, is the question which we are to consider. In Johnson v. Pie, reported in 1 Levinz, 169, and 1 Siderfin, 258, and 1 Keble, 905, 913 (decided in 1664 after being twice argued), the infant had affirmed that he was of full age, and, confiding in this representation, the plaintiff had lent him money; and the action was an action on the case for the infant's fraudulent representation in respect to his age. After verdict for the plaintiff, judgment was arrested on the ground that, "although infants may be bound by actual torts, as trespass, &c., which are vi et armis et contra pacem, they will not be bound by those which sound in deceit;" and Lord Chief Justice Kelynge is reported to have

expressed great indignation at the attempt to charge an infant in tort upon that which was the foundation of an action of assumpsit, and to have said that, if the judgment was not arrested, the whole foundation of the common law would be at stake. Graves v. Neville, 1 Keble, 778,—an action on the case in the nature of deceit for the sale by the defendant of goods as his own, when in truth they belonged to another,—the Court said that this was no actual tort, nor anything ex delicto, but only ex contractu. The principle of these cases has uniformly been adhered to in the English Courts. In Green v. Greenbank, 2 Marshall, 485 (4 E. C. L. 375), where the plaintiff declared in an action on the case, that, having agreed to exchange mares with the defendant, the latter by falsely warranting his mare to be sound, well knowing her to be unsound, &c., falsely and fraudulently deceived the plaintiff, &c., it was held that infancy was a good plea in bar, on the ground that the assumpsit was clearly the foundation of the action, and that the deceit was practised in the course of the contract. The case of Johnson v. Pie was recognized as of unquestioned authority in the cases of Price v. Hewett, 8 Exch. 146 (18 Eng. L. & E. 522), decided in 1853; Liverpool Adelphi Loan Association v. Fairhurst et ux., 9 Exch. 422 (26 Eng. L. & E. 393), decided in 1854; Wright v. Leonard et ux., 11 J. Scott, N. s. (C. B. 103 E. C. L.) 258, decided in 1861; and Bartlett v. Wells, 1 Best & Smith, Q. B. (101 E. C. L.) 836, decided in 1862. See also the case of De Roo et al. v. Foster, 12 J. Scott n. s. (C. B. 104 E. C. L.) 272, decided in 1862. the case of the Liverpool Adelphi Loan Association v. Fairhurst et ux., ubi supra, PARKE, B., says expressly "that where the tort is incidental to the contract, as the contract is altogether void, the fraud goes for nothing." The rule of decision in the case of Johnson v. Pie seems never to have been questioned, much less overruled, in any English case; and it remains as good law in the English Courts at the present day. In this country, although there has not been the same uniformity in the decisions of the Courts, it has been recognized and approved in many cases. Brown v. Dunham, 1 Root, 272; Geer v. Hovy, id. 179; Wilt v. Welsh, 6 Watts, 9; Brown v. McCune, 5 Sandf. Sup. Ct. 228; Homer v. Thwing, 3 Pick. 492; Tucker v. Moreland, 10 Peters, 59. In the case of West v. Moore, 14 Vt. 447, it was expressly held, as in the English case of Green v. Greenbank, ubi supra,

that infancy was a good bar to an action founded upon a false and fraudulent warranty upon the sale of a horse; and in the opinion delivered by Bennett, J., the case of Johnson v. Pie is expressly recognized as being of controlling authority. The same principle was recognized and reaffirmed in the case of Morrill v. Aden, 19 Vt. 505. There are cases in this country in which this rule of decision has been questioned or overruled: as in Wood v. Vance, 1 Nott & McCord (S. C.), 197, which was an action on the case for deceit in a warranty on an exchange of horses; and Peigne v. Sutcliffe, 4 McCord (S. C.), 387, which was an action on the case for the embezzlement of goods entrusted to an infant as a carrier; and Fitts v. Hall, 9 N. H. 441, in which it was distinctly held that an infant is answerable for a fraudulent representation and deceit which is not connected with the subject-matter of the contract, but by which the other party is induced to enter into one with him, if he afterwards avoids the contract by reason of his infancy; as where he represents himself to be of full age, and thereby induces a person to sell him goods upon a credit; and a distinction is suggested of this nature, that an infant is not liable in case for any fraudulent affirmation that makes a part of the contract,—as for a fraudulent representation as to the quality of goods, — but that for fraudulent representations anterior or subsequent to the contract, and not parcel of it, he is liable. This last case is entitled to great respect as being well considered, and was referred to with approbation by Redfield, J., in Towne et al. v. Wiley, 23 Vt. 355,—a case which stood upon ground which did not require any such rule of decision. If the question was to be reconsidered in the English Courts, we should readily agree that there is great cogency and force in the reasoning by which the decision in the case of Fitts v. Hall is sustained; but the case itself is in direct opposition to the whole current of the English and most of the American cases. 1 Amer. Lead. Cas. (4th ed.) 262. In Burley v. Russell, 10 N. H. 184, it was admitted that such an affirmation as in Fitts v. Hall would not estop an infant so as to render him liable on the contract; and the same decision was made in Merriam v. Cunningham, 11 This doctrine implies as a logical sequence that the Cush. 40. avoidance of a contract induced by such a representation is the legal right of the infant, and not a fraud. The case of West v. Moore, ubi supra, which was decided in this Court nearly four

years after the decision of the case of Fitts v. Hall, proceeds in this respect on the same ground with Burley v. Russell, ubi supra; and there is no apparent difference in principle between a falsehood expressed in words and the same falsehood properly inferred from actions, demeanor, or silence. Both are equally fraudulent, and the damage resulting from the one would be as great as from the other. The allegation of concealment would not, therefore, distinguish this case from one in which the falsehood was distinctly affirmed in words; and the plaintiff's cause of action in this case derives no additional strength from his offer to return the property.

The refusal of the defendant to return the price of the property was not a disaffirmance or avoidance of the contract by him; and unless he had the money in his possession, so that he could restore it to the plaintiff when the horse was tendered back to him, no action of trover for it could be sustained against him. was held in the case of Fitts v. Hall. We think that the fair result of the American as well as of the English cases is, that an infant is liable in an action ex delicto for an actual and wilful fraud only in cases in which the form of action does not suppose that a contract has existed; but that, where the gravamen of the fraud consists in a transaction which really originated in contract, the plea of infancy is a good defence. For simple deceit on a contract of sale or exchange, there is no cause of action, unless some damage or injury results from it; and proof of damage could not be made without referring to and proving the contract. action on the case for deceit on a sale is an affirmance by the plaintiff of the contract of sale; and the liability of the defendant in such an action could not be established without taking notice of and proving the contract. It was held by this Court in West v. Moore, ubi supra, that the deceit or fraud to charge an infant must be wholly tortious; and that, if the matter arises from contract, although infected with fraud, it cannot be turned into a tort to charge him by a change in the form of action; and this principle fully sustains the defence of infancy in this action.

We think that there is no greater liability for deceit resulting from the fraudulent concealment by an infant of a material fact, than there is for his false and fraudulent affirmation in respect to the same fact; and if the recognized rule of law by which our judgment is controlled is wrong, it should be changed by statute, as it has been changed in some other States. Code of Iowa, 1851, p. 224, § 1489;¹ Compiled Laws of Kansas, 1862, p. 720, c. 146, § 3. It was well said by Gibson, C.J., in Wilt v. Welsh, ubi supra, that, "in contemplation of law, an infant of three years is not inferior in discretion to one of twenty;" and it is to be remembered, that no general principle of policy can be established without being the occasion of hardship or injustice in particular cases. Judgment of the County Court for the defendant on demurrer to the defendant's plea affirmed.

In Eaton v. Hill, 50 N. H. 235, the authorities are well collated, as follows: Case, by Eaton & Whittemore v. Charles E. Hill and Dana Cummings. The declaration and plea of Charles E. Hill make part of the case, and to the plea the plaintiffs demurred generally. Declaration. "In a plea of the case for that the said defendants, on the twenty-fourth day of June, 1870, at Manchester aforesaid, in the county aforesaid, hired of the said Eaton & Whittemore a certain horse and carriage, to ride from said Manchester to said Nashua, for a certain price; and the said Eaton & Whittemore delivered to the said defendants the said horse and carriage for that purpose. Yet the defendants so carelessly and immoderately drove said horse, that by means thereof the said horse, on the said twenty-fourth day of June, 1870, at Nashua aforesaid, died." Plea. "And the said Charles E. Hill, who is under the age of twenty-

¹ Sec. 2541 of Revision of 1860. Under this section, it is held that suit may be brought and judgment rendered against a minor during his minority, in cases where, on account of the minor's own misrepresentations as to his majority, or from his having engaged in business as an adult, the other party had good reason to believe the minor capable of contracting. Oswald v. Broderick, 1 Clarke (Iowa), See also Prouty v. Edgar, 6 **380.** Clarke (Iowa), 372. But to render an infant who engages in business, and thus holds himself out as capable of contracting, liable under this section (2541), his infancy must have been unknown to the party contracting with him. If known to him, the statute creates no shield to the contract. Bel-

(a) Substantially this proposition, irrespective of statute, is stated to be

ler v. Marchant, 30 Iowa, 350. The statute referred to reads thus:—

"Sec. 2540. A minor is bound not only by contracts for necessaries, but also by his other contracts, unless had disaffirms them within a reasonable time after he attains his majority, and restores to the other party the money or property received by him by virtue of the contract, and remaining within his control at any time after his attaining his majority.

"Sec. 2541. No contract can be thus disaffirmed in cases where, on account of the minor's own misrepresentations as to his majority (a), or, from his having engaged in business as an adult, the other party had good reason to believe the minor capable of contracting."

the law in Kilgore v. Jordan, 17 Tex. 855.

one years, by Charles R. Morrison, his guardian, who is admitted by the Court to defend for him, comes and defends, &c., when, &c.; and says, that at the time of the letting, careless, and immoderate driving and death of the horse therefrom, in said declaration mentioned, the said Charles E. Hill was under twenty-one years of age, — to wit, was of the age of eighteen years, and no more, and this he is ready to verify. Wherefore he prays judgment, if the plaintiffs their action aforesaid ought to have or maintain against him, and for his costs," &c.

Bellows, C. J. The substance of the declaration is, that the defendant, having hired the plaintiff's horse for a short journey, drove him so carelessly and immoderately as to cause his death. No promise is alleged to drive him moderately and with due care; but the plaintiffs put their case upon the ground of a breach of duty by the defendant, and the doing of a tortious act, and the question is whether a minor is liable in such case. On this point the authorities are not altogether harmonious. In Fitts v. Hall, 9 N. H. 441, the cases were examined, and this principle deduced from them, in the opinion by PARKER, C. J., that, "if the tort or fraud of an infant arises from a breach of contract, although there may have been false representations or concealment respecting the subject-matter of it, the infant cannot be charged for this breach of his promise or contract, by a change of the form of action. But if the tort is subsequent to the contract, and not a mere breach of it, but a distinct, wilful, and positive wrong of itself, then, although it may be connected with a contract, the infant is liable." In that case it was decided that an infant was liable for deceit in falsely representing himself to be of age, and thereby inducing the plaintiff to sell him goods on credit, and afterwards avoiding his promise to pay by pleading infancy. The general doctrine of Fitts v. Hall is fully approved in Prescott v. Norris, 32 N. H. 103, per Perley, C. J., and is supported by the reasoning of the Court in Woodman v. Hubbard, 25 N. H. 67, Indeed, it would seem to be too clear to admit of controversy that an infant bailee must be liable for the injury or destruction of the thing bailed, by his positive, wilful, and tortious act, even although it was part of the contract, express or implied, that the goods should be safely returned. As if, in the case of the bailment of a horse, he wilfully beat him to death, or wilfully drove him so immoderately as to endanger his life, and knowing that he did so, and actually causing his death. Such acts, indeed, would be wholly unauthorized by the contract of bailment; and in respect to them the infant would stand as if no such contract existed. So that an action of trover might be maintained against him on the ground that the bailment was thereby determined. Wentworth v. McDuffee, 48 N. H. 402. It does not follow from this that, for every case of immoderate driving for which an adult would be liable, an infant bailee would also be liable. The bailee in these cases is understood to stipulate for ordinary care and skill in the use of an animal so bailed; and for any injury caused by the want of it, he is liable. In the case of the infant, however, his promise to use due care and skill does not bind him; but he is still liable for positive, tortious acts, wilfully committed, whereby the thing bailed is injured or destroyed. If, through want of skill and experience, the animal is unintentionally injured by the infant, it might well be contended 120 INFANCY.

that he would not be liable, because he has made no binding promise to exercise such skill. There are cases which hold that an infant who hires a horse for a journey is not liable for an injury caused by immoderate driving. The case of Jennings v. Rundell, 8 T. R. 335, is of this character; and the Court held that the course of action arose out of a contract, and that the infant could not be made liable by changing the form of action to tort. This case is criticised and doubted by PARKER, C. J., in Fitts v. Hall, upon the ground that Lord Kenyon seemed to regard the injury as resulting from an accident, without adverting to that part of the declaration which might, with proper proof, have made a case of conversion. It is very true that Lord Kenyon, in his opinion, assumes that the injury to the horse was accidental; although the declaration alleges that the defendant wrongfully drove the mare immoderately, and so caused the injury. The other judges also assume that the cause of action was substantially a breach of contract; and if this were so, the decision was clearly right, and would not conflict with the doctrine of Fitts v. Hall. There are other authorities that accord with Jennings v. Rundall. See 1 Am. Lead. Cases, 4th ed. 261-268, and cases cited. In Schenk v. Strong, 1 South. 87, infancy was held to be a good bar to an action on the case alleging that a chair was lent to defendant for a particular journey, to be used carefully, and returned at a specified time; yet that he went on a different journey, carelessly broke it, and did not return it at the time agreed, thereby violating his engagement in every particular. In all respects, except the going a different journey, this has the character of a mere breach of contract, for which the infant cannot be made liable by changing the form of action. The using the chair for a different journey was not a mere breach of contract, but a positive tortious act, for which the infant was liable in some proper form of action. Homer v. Thwing, 8 Pick. 492; Towne et al. v. Wiley, 23 Vt. 353. In such cases the infant stands like an adult, and is liable on the ground that using the thing bailed for another purpose is a conversion. In such case an adult is clearly liable. Woodman v. Hubbard, 25 N. H. 72, where it was held by Perley, J., that driving a horse to a place beyond the limits for which he was hired, was a wrongful invasion of the plaintiff's right of property, and not a mere breach of contract; and the case Homer v. Thwing is cited and approved. The judge says that this case and Vasse v. Smith, 6 Cranch, 231; Campbell v. Stakes, 2 Wend, 137, and Mills v. Graham, 1 Bos. & P. N. R. 140, are strong authorities to the point that an infant who receives goods on a contract, and disposes of the property without right, is liable in trover. In Mills v. Graham, 1 Bos. & P. N. R. 140, it was held that an infant who had received of the plaintiff skins to be dressed and returned was liable in trover for refusing to return them on demand. In Parsons on Cont. 264, it was laid down that, for a tort or fraud which is a mere breach of his contract, an infant is not liable; but where the tort, though connected by circumstances with the contract, is still distinguishable from it, there he is liable: as, if he hires a horse for an unnecessary ride, he is not liable for the hire; but if, in the course of the ride, he wilfully abuses and injures the horse, he is liable for the tort; and if he should sell the horse, trover would lie. In 2 Greenl. Ev. § 368, it is laid down, that an infant bailee of a horse is not liable for

treating him negligently or riding him immoderately; but is liable if he goes to a different place, or beats the animal to death. In Campbell v. Stakes, 2 Wend. 187, it was held that, if an infant who has hired a horse wilfully and intentionally injures the animal, trespass will lie against him, or if he does any wilful or positive act which amounts to a disaffirmance of the contract; but if he neglect to use him with ordinary care, or to return him at the time agreed on, he is not liable. This case is cited with approbation in Fitch v. Hall. Campbell v. Stakes was an action of trespass; and the Court held that infancy, with an averment that the injury occurred in driving the horse through the unskilfulness and want of knowledge, discretion, and judgment of the defendant, was a good plea. In Towne et al. v. Wiley, 23 Vt. 359, the doctrine is said to be that infants are held liable for positive and substantial torts, but not for violations of contracts merely, although by the rules of pleading a plaintiff might declare in tort or contract at his election; and in this case Judge REDFIELD indorses the doctrine of Fitts v. Hall. We think, then, that the doctrine is well established that an infant bailee of a horse is liable for any positive and wilful tort done to the animal distinct from a mere breach of contract, — as, by driving to a place other than the one for which he is hired, refusing to return him on demand after the time has expired, wilfully beating him to death, and the like; so, if he wilfully and intentionally drive him at such an immoderate speed as to seriously endanger his life, knowing that it will do so. In Wentworth v. McDuffee, 48 N. H. 402, such driving by an adult was held to be a conversion; and, for aught we can see, the same principle would apply to the case of an infant. In all these cases it may be urged that the law implies a promise, on the part of the bailee, to drive the horse only to the appointed place, to return him at the end of the journey, not to abuse him or drive him immoderately; and that a failure in either respect is merely a breach of contract. So it might be said that the law would raise a promise not to kill him; and yet no one would fail to see that to kill him wilfully would be a positive act of trespass, for which an infant should be hable the same as if there were no contract. Between acts that are to be regarded as mere breaches of the contract of bailment and positive and wilful torts, a line must be drawn somewhere; and although it must often be difficult to discriminate between them, we think it is safe to hold that the acts we have named, and others of a like character, are positive torts for which an infant is liable, and not mere breaches of contract. When the infant stipulates for ordinary skill and care in the use of the thing bailed, but fails for want of skill and experience, and not from any wrongful intent, it is in accordance with the policy of the law that his privilege, based upon his want of capacity to make and fully understand such contracts, should shield him. A failure, in such a case, from mere want of ordinary care or skill, might well be regarded as in substance a breach of contract for which the infant is not liable, even although in ordinary cases an action ex delicto might be sustained. But when, on the other hand, the infant wholly departs from his character of bailee, and by some positive act wilfully destroys or injures the thing bailed, the act is in its nature essentially a tort, the same as if there

had been no bailment, even if assumpsit might be maintained in the case of an adult, or a promise to return the thing safely. In the case before us, the declaration embraces a charge of immoderate driving, whereby the plaintiff's horse was killed; and, as we have seen, the proof might be such, under a proper declaration, as to charge the infant; and it might be such as to show that the immoderate driving was unintentional, and wholly owing to want of experience and discretion, in which case he would not be liable. The question then is, whether an action on the case, as this is, can be maintained for any cause of action that may be proved under this declaration. If it can be, the demurrer must be sustained. In some cases it is held, that by a positive and wilful tort the bailment is determined, and the remedy must be by action of trespass or trover, and that case will not lie. Such is the doctrine of Campbell v. Stakes, before cited; and the Court put it upon the ground that the action on the case necessarily supposes the defendant to have a right to the possession of the property, under the contract of hiring, at the time the injury was committed, and that by declaring in case the plaintiff affirms the existence of such contract, and the plea of infancy would be a good defence to such action, — citing Jennings v. Rundall, 8 T. R. 335, and Green v. Greenbank, 2 Marshall, 485; 4 Eng. Com. Law, 375. To the correctness of this view we are unable to subscribe. If a wrong has been done to the property bailed, of such a nature that an action on the case would ordinarily be an appropriate remedy, and at the same time an infant would be liable for it in any form of action, we perceive no reason for holding that case would not lie against him. If the declaration sets out a cause of action which is good against an infant bailee, by reason of its being a positive and wilful wrong, and not a mere breach of contract, and at the same time, according to the rules of pleading, an action on the case appears to be the appropriate remedy, we think it clear that such an action would be maintained. If it were necessary that the bailment should be determined in order to maintain the action. the facts stated would show it, the same as it would be shown by stating a conversion in trover. In many cases trespass or trover will lie for injuries done by bailees, and to maintain those suits the bailment must have been determined; and this is shown by proof of tortious acts inconsistent with the bailment, and, from the bringing of these suits, it may fairly be inferred that the plaintiff elects to consider the bailment at an end. In bringing an action on the case setting out such a positive and wilful tort as is wholly inconsistent with the contract of bailment, and amounts to a disaffirmance of it, the same inference may be made. In all these cases the actions are based upon acts which disaffirm the contract of bailment, and the bringing the suits is an election by the bailor to consider the bailment terminated; and this applies to an action on the case for a tort which disaffirms the contract, the same as to trespass or trover; the latter is indeed but a subdivision of actions upon the case.

We are brought then to the conclusion, that case will lie against an infant bailee for a positive and wilful tort of such a nature that, upon general principles of pleading, case is a proper remedy. Whether such a cause of action exists here, remains to be seen. The declaration does not state such a cause.

It states a bailment of the horse to defendant, and that he drove him so carelessly and immoderately as to cause his death. This we think does not go far enough to charge an infant bailee. It indeed goes no farther than to charge him with what is in substance a breach of contract, and to that the plea of infancy is a good defence. In this respect it comes within the principle of Jennings v. Rundall, 8 T. R. 335, before cited. It is true that the immoderate driving may have been a positive and wilful act, so as to make the infant liable; but we think that, unless it is so stated, the plea of infancy is a good defence. If the facts will justify it, the plaintiffs may have leave to amend their declaration upon terms which will be the costs of demurrer. Whether the facts will justify such an amendment of the count in case as will support it, remains to be seen. That a count in case might under some circumstances be the appropriate remedy, may be inferred from the case of Gilson v. Fisk, 8 N. H. 404; and the cases cited, as well as the case of Waterman v. Hall, 17 Vt. 128, and numerous cases where it is held that a party may, at his election, sue in trespass, or waive the trespass and sue in case. Under some circumstances trover would lie, as we have seen; and as case and trover may be joined, there would seem to be no objection to adding a count in trover by way of amendment, if the identity of the cause of action would be preserved. As it now stands, the conclusion is, the

Demurrer must be overruled.

FITTS v. HALL, 9 N. H. 441. — The declaration alleged that, on the 26th day of May, 1830, the plaintiff owned and was possessed of a large quantity of palm-leaf and chip hats; that a conversation was then had between the parties about the defendant's purchasing the hats of the plaintiff; that the plaintiff, not knowing whether the defendant was of age, inquired of him whether he was of full age or not; and that the defendant, well knowing that he was an infant under the age of twenty-one years, and intending to deceive and defraud the plaintiff, falsely and deceitfully represented that he was then of full age; and that thereupon the plaintiff, confiding in that representation, sold and delivered the hats to the defendant, on a credit of six months, and took his note therefor, on that time, for the sum of \$57. The declaration further set forth that, the note not being paid when due, the plaintiff sued the defendant thereon, and duly entered and prosecuted his action; that the defendant pleaded, first, the general issue, and, secondly, infancy; that the plaintiff joined the general issue, and to the plea of infancy replied that the defendant, at the time of giving the note, represented himself to be of full age, &c.; that to this replication there was a demurrer and joinder, and it was considered by the Court that the replication was bad and insufficient; and thereupon the plaintiff became nonsuit, and the defendant recovered judgment for his costs, taxed at \$37.62; and that the defendant, by his said false and deceitful affirmation, obtained possession of said hats, and deceived and defrauded the plaintiff, and has never paid said note, nor redelivered the hats to the plaintiff, nor paid him therefor.

There was also a count in trover for the hats. The plaintiff on the trial introduced evidence in support of the allegations in the first count.

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The Court instructed the jury, that, if they were satisfied, from the plaintiff's evidence, of the truth of the facts set forth in the declaration, they might, for the purpose of this trial, consider the action sustainable in point of law; and that, if they found a verdict for the plaintiff, they might find such an amount as would indemnify the plaintiff for the loss he had sustained in consequence of the defendant's false and fraudulent representations. The jury found a verdict for the plaintiff for \$128.91; whereupon the defendant moved that the verdict be set aside, and a nonsuit entered.

Christie, for the defendant, contended: 1. That all the facts in the first count, if properly stated and proved, were not sufficient in law to entitle the plaintiff to maintain this action. 2 Kent's Com. 197, and cases cited. 2. That the plaintiff was not at liberty to abandon the contract, and call upon the defendant in an action of tort, in order to charge him; especially as he had attempted to enforce the contract after he knew the ground of defence. 3. That, if the plaintiff recovered at all, he ought only to recover the amount of the note, and not the costs and expenses of the suit upon the note. 4. That the count in trover could not be maintained without proof of a demand and refusal, as the goods were voluntarily delivered to the defendant by the plaintiff.

J. P. Hale, and James Bell, for the plaintiff, cited Com. Dig., "Action on the Case for Deceit," A. 10; 2 Kent's Com. 241; Badger v. Phinney, 15 Mass. 359; Stoolfoos v. Jenkins, 12 Serg. & Rawle, 399; Homer v. Thwing, 3 Pick. 493; Bristow v. Eastman, 1 Esp. 172; Vasse v. Smith, 6 Cranch, 226; Jennings v. Rundall, 8 D. & E. 335; Fosdick v. Collins, 1 Stark. 173; 2 Stark. Ev. 849; 2 Wheaton's Selwyn, 457.

PARKER, C. J. The general principle applicable to this case is, that an infant is liable in actions ex delicto, whether founded on positive wrongs, or constructive torts, or frauds. 2 Kent's Com. 197; 1 Chitty's Pl. 65. Thus he is liable in trover, although the goods converted were in his possession by virtue of a previous contract. Vasse v. Smith, 6 Cranch, 231; Homer v. Thwing, 3 Pick. 492. And in detinue, where he received skins to finish, and afterwards withheld them. Mills v. Graham, 4 Bos. & Pul. 140. assumpsit for money had and received has been sustained against an infant for money embezzled. Bristow v. Eastman, 1 Esp. 172; s. c. Peake, 222. But a matter of contract, or arising ex contractu and properly belonging to that class, is not to be turned into a tort, in order to charge the infant by a change of the form of action. 2 Kent's Com. 197. As, for instance, where the plaintiff declared that, having agreed to exchange mares with the defendant, the defendant, by falsely warranting his mare to be sound, well knowing her to be unsound, falsely and fraudulently deceived the plaintiff, &c.; held, that infancy was a good plea in bar. Green v. Greenbank, 2 Marshall, 485; 4 E. C. L. 375. In Jennings v. Rundall, the plaintiff declared in case, that, at the request of the defendant, he delivered to him a certain mare, to be moderately ridden, and the defendant wrongfully rode her in an immoderate, excessive, and improper manner, and took so little care of her that, by reason thereof, she was strained and damaged; and, in a second count, alleged that he delivered the mare to the defendant to go and perform a reasonable and

moderate journey, and the defendant wrongfully rode and worked her a much longer journey. On a demurrer to a plea of infancy, the Court considered the action as founded substantially on the contract, and gave judgment for the defendant. Lord KENYON said: "The plaintiff let the mare to hire; and in the course of the journey an accident happened, the mare being strained; and the question is, whether this action can be maintained. I am clearly of opinion that it cannot: it is founded on contract. If it were in the power of a plaintiff to convert that which arises out of a contract into a tort, there would be an end of that protection which the law affords to infants." 8 D. & E. 836. It is undoubtedly true, that the substance of all the matter thus alleged in the plaintiff's declaration, in Jennings v. Rundall, might have been set forth in an action of assumpsit; and regarding it, as Lord Kenyon did, as an injury resulting from an accident, it would seem to be an attempt to convert an action founded on contract into a tort. But the attention of the Court does not seem, in the opinion delivered, to have been directed to the question, whether part of the matter thus alleged might not, upon proper proof, have sustained the count in trover, which was also contained in the declaration, or an action of trespass. It is apparent, from the cases before cited, that an infant may be charged for a tort arising subsequent to a contract, and so far connected with his contract that but for the latter the tort would not have been committed. In Homer v. Thwing, the defendant hired a horse to go to a place agreed on, but went to another place, in a different direction; and he was held liable in trover for an unlawful conversion. And in Campbell v. Stakes, 2 Wend. 137, where an infant took a mare, on hire, and drove her with such violence, and otherwise cruelly used her, that she died, it was held that trespass might be maintained against him; and the judgment of the Supreme Court was unanimously confirmed by the Court of Errors. Chancellor Walworth said: "If the infant does any wilful and positive act, which amounts on his part to an election to disaffirm the contract, the owner is entitled to the immediate possession. If he wilfully and intentionally injures the animal, an action of trespass lies against him for the tort. If he should sell the horse, an action of trover would lie, and his infancy would not protect him." The principle to be deduced from these authorities seems to be, that if the tort or fraud of an infant arises from a breach of contract, although there may have been false representations or concealment respecting the subject-matter of it, the infant cannot be charged for this breach of his promise or contract by a change of the form of action. But if the tort is subsequent to the contract, and not a mere breach of it, but a distinct, wilful, and positive wrong of itself, then, although it may be connected with a contract, the infant is liable. Upon this principle, the count in trover, in this case, cannot be supported upon the evidence offered. The goods went into the possession of the defendant by virtue of a contract, which he has avoided by reason of his infancy. The effect of that contract was to authorize him to appropriate the goods to his own use as owner, and to dispose of them at his pleasure. If he has done so by using them, or selling them to third persons, so that he cannot redeliver them, neither his refusal to pay nor a refusal to deliver the goods can be considered as anything more

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than a breach of contract. A refusal to pay is a breach of the express contract; and a refusal to return the goods, after he had converted them with the assent of the plaintiff, and when he no longer had it in his power to return them, could be considered as no more than a breach of an implied assumpsit to return the goods, upon request, after he had rescinded the contract by a refusal to pay. Were this otherwise, the law would furnish him no protection against his contract in such case; for by a subsequent demand of the goods, which he had not the power to comply with, he would be made liable for their value in trover, although he could not be charged in assumpsit. It does not appear in this case that there was such a demand; but if one was made, there is no evidence that the defendant, after he denied his liability on the contract, could have complied with it. Still less is there any ground for charging the defendant in trover, because the plaintiff was induced to make the contract upon which he received the goods, by his misrepresentations. The goods were, notwithstanding, received upon a contract; and if the contract had not been rescinded by the defendant, upon the ground of his infancy, there would have been no pretence for an action of trover. His thus rescinding it cannot be held, of itself, to be a conversion. If after the defendant in this case had interposed his plea of infancy, and refused to perform the contract, the plaintiff had demanded the hats, and the defendant, having them in his possession, had refused to deliver them, that would have been a wilful, positive wrong of itself, disconnected from the contract; and upon such evidence the count in trover might have been maintained. Where goods were sold to an infant, on a credit, upon his representation that he was of full age, and a plea of infancy was interposed, an action of replevin was sustained against his administrator, after a demand upon him. Badger v. Phinney, 15 Mass. 359. In this latter case, the defence of infancy was made by the administrator of the infant; the demand of the goods was made upon him, and the action sustained against him; but the Court said: "The basis of this contract has failed, from the fault, if not the fraud, of the infant; and on that ground the property may be considered as never having passed from, or as having revested in, the plaintiff." And upon this ground, if the infant, having rescinded his contract, withholds the goods purchased, after a demand which he had power to comply with, there seems to be no good reason why he should not answer in trover, the same as for any other conversion of property lawfully in his possession. 6 Cranch, 231; 4 Bos. & Pul. 140, before cited. The next question is, whether this action can be maintained against the defendant, for the fraudulent representation that he was of age, by reason of which the plaintiff was induced to sell him the hats, on a credit, and to take his note. An action may be maintained for false and fraudulent representations, in order to induce a party to sell, and whereby he was induced to sell, goods to one of the defendants, on a credit. Livermore v. Herschell, 3 Pick. 33, 36. But Johnson v. Pie. 1 Lev. 169, was "case, for that the defendant, being an infant, affirmed himself to be of full age, and by means thereof the plaintiff lent him 100l., and so he had cheated the plaintiff by this false affirmation." After verdict for the plaintiff, it was moved in arrest of judgment that the action would not lie for this false affirmation, but the plaintiff ought to have informed himself

"Kelynge and Wyndham held, that the action did not lie, because the affirmation, being by an infant, was void; and it is not like to trespass, felony, &c., for there is a fact done. Twysden doubted, for that infants are chargeable for trespass. Dyer, 105. And so, if he cheat with false dice, &c." The report in Levinz states that the case was adjourned; but in a note, referring to 1 Keb. 905, 913, it is stated that judgment was arrested. If this case be sound, the present action cannot be sustained on the first count. From a reference in the margin, it seems that the same case is reported, 1 Sid. 258. Chief Baron Comyns, however, who is himself regarded as high authority, seems to have taken no notice of this case in his Digest, "Action on the Case for Deceit;" but lays down the rule that, "If a man affirms himself of full age when he is an infant, and thereby procures money to be lent to him upon mortgage," he is liable for the deceit; for which he cites 1 Sid. 183; Com. Dig. "Action," &c., A. 10. We are of opinion that this is the true principle. If infancy is not permitted to protect fraudulent acts, and infants are liable in actions ex delicto, whether founded on positive wrongs, or constructive torts, or frauds (2 Kent, 197), as for slander (Hodsman v. Grissel, Noy, 129) and goods converted (auth. ante), there is no sound reason that occurs to us why an infant should not be chargeable in damages for a fraudulent misrepresentation whereby another has received damage. In the argument of Johnson v. Pie, Grove and Nevill's case was cited, "where, in case against an infant for selling a false jewel, affirming it to be a true one, 't was adjudged the action did not lie;" and the case seems to have been considered as if the affirmation that he was of age was to be regarded as part of the contract. But there is a wide difference between the two cases. In Grove and Nevill's case, the subject-matter of the contract was the jewel which was sold. The affirmation that it was a true one was a false warranty of the article sold. If the defendant had been of age, assumpsit might have been maintained. 'The infant was not to be charged by adopting a different form of action. But the representation in Johnson v. Pie, and in the present case, that the defendant was of full age, was not part of the contract, nor did it grow out of the contract, or in any way result from it. It is not any part of its terms, nor was it the consideration upon which the contract was founded. No contract was made about the defendant's age. The sale of the goods was not a consideration for this affirmation or representation. The representation was not a foundation for an action of assumpsit The matter arises purely ex delicto. The fraud was intended to induce, and did induce, the plaintiff to make a contract for the sale of the hats; but that by no means makes it part and parcel of the contract. It was antecedent to the contract; and if an infant is liable for a positive wrong connected with a contract, but arising after the contract has been made, he may well be answerable for one committed before the contract was entered into, although it may have led to the contract. It has been said that "all the infants in England might be ruined," if infants were bound by acts that sound in deceit. But this cannot be a reason why the action should not be maintained for fraudulent wrongs done; for the same reason would seem to apply equally well in cases of slander, trover, and trespass. The latter are as much the results of indiscretion as the former, and quite as likely to be

committed. In Bac. Abr., "Infancy," I. 8, it is said: "Also, it seems, that if an infant, being above the age of discretion, be guilty of any fraud in affirming himself to be of full age, or if, by combination with his guardian, &c., he make any contract or agreement, with an intent afterwards to elude it by reason of his privilege of infancy, that a Court of Equity will deem it good against him according to the circumstances of the fraud." 8 Gwillim's Bac. The authorities cited do not seem to state, specifically, the first branch of the proposition in the text; but there are several cases sustaining the general proposition, that an infant may be bound in equity by a contract which the other party has been induced to enter into by his fraudulent representation or concealment. Lord Teynham v. Webb, 2 Ves. Sen. 212; Evroy v. Nicholas, 2 Eq. Cas. Abr. 489, and cases cited; Beckett v. Cordley, 1 Brown Ch. 358; Fonb. Eq. (4th Am. ed.), 80, note z. At law, he is not bound by the contract, although it was procured by his fraudulent representation that he was of full age. Conroe v. Birdsall, 1 Johns. Cas. 127. If in equity the infant may be bound by the contract, because of his fraud in procuring it, he may well at law be answerable for the previous deceit through which it was procured, if he has hereby obtained the property of another, and refuses performance on his part. Our conclusion is that the action may be sustained on the first count. But we are of opinion that the plaintiff is not entitled to recover in damages the costs of the action he commenced on the note, or those which he was obliged to pay in that suit. For aught which appears, he knew, when he commenced that action, that the defendant was an infant, and would avail himself of his infancy. If he chose to try an experiment, he must abide the consequences. For this reason the verdict must be set aside, and a

New trial granted.

COVERTURE.

CANNEL v. BUCKLE.

(2 Peere Williams, 243; s. c. 2 Eq. Ca. Abr. 23, pl. 24; 136, pl. 1. High Court of Chancery, 1724.)

Antenuptial Agreements between Husband and Wife, in Contemplation of Marriage; — in Equity and at Law.

A feme sole was seised in fee of land of about 10%, per annum, and, designing to marry, agreed with her intended husband, that she upon the marriage would convey her lands to the husband and his heirs; and for that purpose, previous to the marriage, she gave a bond of 2001. penalty to the intended husband, in which the intended marriage was recited; and the condition was that, in case the marriage took effect, she would convey all her said lands to the husband and his heirs. The marriage took effect, and there was issue of the marriage, and the wife made her will reciting her said bond, and devised all her land to her husband in fee, and died. The issue of the marriage died without issue; after which the husband enjoyed the land during his life, and on his death the heir of the husband brought a bill against the heir of the wife, to compel him to convey the lands of the wife to the heir of the husband.

OBJ. This bond given by the wife became void upon the intermarriage because it was then 1 suspended; and a personal action once suspended is extinct; besides, wherever no action lies at law to recover debt or damages, there no suit in equity lies to compel a specific performance, which specific performance is given in equity only in lieu of damages; and 1 Chan. Cases, 21 (Lady Darcey's case), was cited, proving that where a woman, on a treaty of marriage, agrees with a man, or a man with a woman, there the subsequent intermarriage determines the agreement.

¹ V., Gage v. Acton, Com. Rep. 67, and 1 Salk. 325; s. c. Acton v. Peirce, 2 Vern. 480.

LORD CHANCELLOR. The impropriety of the security, viz., a bond from a woman to a man whom she intends to marry, or the inaccurate manner of wording such bond, is not material; for it is sufficient that the bond is a written evidence of the agreement of the parties, that the *feme* in consideration of marriage agrees the man shall have the land as her portion; and this agreement, being upon a valuable consideration, shall be executed in equity.

It is unreasonable that the intermarriage, upon which alone the bond is to take effect, should itself be a destruction of the bond; and the foundation of that notion is, that in law the husband and wife being one person, the husband cannot sue the wife on this agreement; whereas, in equity it is constant experience that the husband may sue the wife, or the wife the husband, and the husband might sue the wife upon this very agreement in the principal case. Neither is it a true rule, which had been laid down by the other side, that, where an action cannot be brought at law on an agreement for damages, there a suit will not lie in equity for a specific performance, as is plain from this case:— Suppose a feme infant seised in fee, on a marriage with the consent of her guardians, should covenant in consideration of a settlement to convey her inheritance to her husband; if this were done in consideration of a competent settlement, equity would execute the agreement, though no action would lie at law to recover damages. But in regard this bond was a very stale one (being given so long since as in 1678), and the husband had for so long a time omitted to sue upon it in equity, the Court ordered a trial at law to see whether this bond was executed or not, and all other matters to be respited till after the trial.2

As to the case put by Lord Mac-CLESFIELD, of the feme infant, vide Lucy v. Moor, 3 Bro. P. C. 514; Price v. Seys, Barnard. 122; Seamer v. Bingham, 3 Atk. 56; Harvey v. Ashley, 3 Atk. 607, 615; Earl of Buckinghamshire v. Drury, 5 Bro. P. C. 570; Durn-

ford v. Lane, 1 Bro. Ch. 106; Williams v. Williams, 1 Bro. Ch. 152; Slocombe v. Glubb, 2 Bro. Ch. 545. Contra, etiam, vide Shaw v. Boyd, 5 S. & R. 312.

² Reg. Lib. A., 1723, fol. 484.

RIPPON v. DAWDING.1

(Ambler, 565. High Court of Chancery, 1769.)

Antenuptial Contract between Husband and Wife, to allow Wife to dispose of her Freehold Estate by Deed or Will. In Equity.

DOROTHY ——, widow, was seised of a freehold estate; and, previous to her marriage with —— Deeping, her second husband, a bond was entered into by Deeping, with a condition empowering her to dispose of her freehold estate by deed or will, notwithstanding her coverture. No settlement appeared to have been made upon the occasion, nor any other transaction passed but the above-mentioned bond. The wife afterwards by will gives her estate to her younger children in fee.

The eldest son being dead, and leaving a daughter, his only child; bill by the younger children against the daughter, to have a conveyance of the estate.

And the case of Wright v. Lord Cadogan, in Chancery, afterwards in the House of Lords, was cited as an authority in point. And it was said, the principle upon which that case was determined holds in this case; that is, the performance of the marriage agreement, as against the heir-at-law of the contracting party.

On the other side, it was said, that this case differs materially from Wright v. Lord Cadogan. In that case, the legal interest was in trustees; in this, the legal interest remained in the wife, and nothing passed by the devise. That, whatever might have been the case if the wife had made a disposition for a valuable consideration, yet, it being a question between volunteers, the Court will not interfere to compel a performance of the agreement.

Lord Campen, Chancellor: It is a mistake to call it a question between volunteers.² The agreement was made on marriage,

¹ Reg. Minute Book, Mich. Term, 1769; s. c. Hill, MSS., vol. 3, 429; vol. 10, 236; vol. 11, 66. For a note of what took place at the hearing of

this cause, as reported in Sergt. Hill's MSS., vol. 3, 429, see Blunt's ed. of Ambler's Ch. 566, note (3).

² See Harvey v. Harvey, 1 Atk. 567.

and the wife might have compelled the husband to join with her in a fine.

Though the two cases differ, in respect that the wife had only an equitable interest in the one and the legal interest in the other, yet the principle of determination is the same in both; equity follows the law. And, as the Court decreed performance of the agreement in Wright v. Lord Cadogan, which was a trust interest, it will do so in this, which is the case of a legal interest.

Therefore decree conveyance, &c.

Bradish v. Gibbs.

(3 Johns. Ch. 523. Court of Chancery of New York, 1818.)

Antenuptial Agreement between Husband and Wife, to allow Wife to dispose of her Real Estate by Will. In Equity. — Execution of a Power by Will.

In April, 1814, the plaintiff and Helen Elizabeth Gibbs entered into a marriage contract; she being seised in her own right of a valuable real and personal estate, which the plaintiff agreed should be at her disposal, notwithstanding the contemplated Articles of agreement were thereupon made and executed between them, under seal, dated the 20th of April, 1814, reciting the treaty of marriage to be solemnized, and that she was possessed, in her own right, of certain personal estate, described in a schedule thereunto annexed, and might become entitled to other personal property not mentioned; and that, whereas by the marriage, the personal property would vest in the plaintiff, and, in case of his decease intestate, would go to his heirs; and that, by the marriage treaty, it was agreed that in case of the death of the plaintiff, leaving her his survivor, without issue, the said personal property should vest in her absolutely, in like manner as if no marriage had taken place, - in order, therefore, to carry the said treaty of marriage into effect, the plaintiff, in consideration of the marriage, covenanted with the said Helen Elizabeth Gibbs that, if the marriage should take place, and the plaintiff should die, leaving his wife living, without issue by her at his death, then all the personal property

described in the schedule and personal property not mentioned therein, of which the plaintiff, by virtue of the marriage, might become possessed, in right of his wife, either by gift, descent, purchase, &c., should on his decease vest in her, absolutely, in fee, &c. The plaintiff further covenanted, that, if any part or the whole of the real estate of which she was then seised, and which was mentioned and described in the said schedule, should be sold during the coverture, the proceeds of such sale, or the amount thereof, should be reinvested in other real estate in her name and for her use; and that she should at all times during her coverture have full power effectually to dispose of, according to her pleasure by will, or by any instrument in writing, in the nature of and purporting to be so, all such real estate as she might at the time be seised of in her own right, either jointly or severally; and to that end the will, or any instrument in writing purporting to be such, of her, though made and executed during the coverture, should be equally valid as if she at the time of making thereof was a feme sole; and that the plaintiff, his heirs, executors, &c., would do all such acts as might be needful and proper, in law or equity, on his or their part, for carrying the same into effect.

The real estate mentioned in the schedule was described as a lot and house in the city of New York, purchased of J. Shaw, and which cost \$23,250. The parties, after the execution of the contract, were married, on the 21st of April, 1814, and lived together until her death in April, 1816.

A contract had been entered into in February, 1814, by and on behalf of Helen Elizabeth Gibbs, with J. Shaw, for the purchase from him of the house and lot above mentioned: the sum of \$750 was paid as part of the purchase, and the residue was agreed to be paid on the delivery of the deed, on or before the 21st of May, 1814; and the balance, being \$22,500, was paid by the plaintiff after the marriage, out of the personal estate of his wife, on the 29th of April, 1814; and the deed which had been previously executed by J. Shaw to Helen Elizabeth Gibbs, and delivered as an escrow to C. W., was delivered by him. The plaintiff and his wife took possession afterwards, and occupied the premises until her death; and the plaintiff has since continued in possession, having, during the life of his wife, expended large sums in improvement.

In August, 1815, the wife of the plaintiff, in pursuance of the power reserved to her by the articles of agreement, made her will, in such a manner as would have passed all her real estate had she been a feme sole. The will in substance was, that she revoked all former wills, and gave and devised to the plaintiff, and his heirs for ever, all her estate, of what nature or kind soever, without reserve, whether real, personal, or mixed, or in possession, reversion, or remainder, and appointed the plaintiff her sole executor. The testatrix died without issue, on the 7th of April, 1816, leaving the said will unrevoked, being then seised of the house and lot in question, leaving two brothers and three sisters her heirs-at-law. One of the sisters afterwards died, on the 13th of January, 1817. The bill of the plaintiff prayed that the defendants, who are the two brothers and sisters of his deceased wife, should be decreed to execute a conveyance to him of the legal estate in the said house and lot.

The answer of the defendants admitted the facts stated in the bill, but denied that the wife of the plaintiff had adequate power to dispose of her real estate in equity by will, so as to vest the title in equity in her husband; and they averred that the will did not operate in the nature of an appointment to vest the equitable title in the plaintiff; and that the will being made during coverture, and in favor of the husband, was void as to the house and lot, both at law and in equity. On the argument of the cause, three points were raised for the consideration of the Court:

- 1. That the power reserved to Mrs. B. by the antenuptial contract was executed in equity by the instrument purporting to be her last will; and that the plaintiff was, therefore, entitled to a conveyance from her heirs-at-law, of the legal estate, according to the prayer of the bill.
- 2. As the real estate in question was paid for out of the personal estate of Mrs. B., it may be considered in equity as a personal estate; and, if so, her will would be a valid disposition of it.
- 3. That, at all events, the plaintiff was entitled to be reimbursed the amount he had expended on the real estate in repairs and improvements.

Wells, for the plaintiff.

Riggs, contra.

The CHANCELLOR. The question in this case is, whether the plaintiff, by reason of the antenuptial agreement and the subsequent will, is entitled to the aid of this Court, to compel the defendants, who are the heirs-at-law of the wife, and upon whom the legal title to the premises descended, to convey the same to him.

I shall confine myself to the consideration of this important point; and, as my conclusion will be in favor of the plaintiff, the discussion of the subordinate points will become unnecessary.

This is a dry question, resting entirely on the technical rules of equitable jurisprudence; and I shall be obliged to examine minutely the authorities which are applicable to the subject, and shall endeavor to extract from them the true principle which ought to govern the case.

It is settled that a feme covert may execute by will, in favor of her husband, a power given to her while sole over her real estate.

In Rich v. Beaumont, 3 Bro. P. C. 308, a treaty of marriage was concluded between the appellant and his intended wife. She then conveyed an estate of which she was seised, in trust, and with the declared intent to suffer a recovery, and that the recovery was to enure to the uses and upon the trusts declared, which were, among others, that the wife should receive the rents and profits for her sole and separate use for life, exclusive of her husband; and if she should leave issue, then, upon trust, that the trustees should convey to such issue, according to her direction by deed or will, and, in default of issue and in case she survived her mother, then to such uses and persons as she by deed or will should appoint. The recovery was suffered, and the marriage shortly after took place. The wife, during coverture, had a son, and survived her mother and made her will, in which, among other dispositions, she gave to her only son the estate, with a reservation in favor of her husband of one half of the profits for life; she added, that, if her son should die during his minority without lawful issue, that she then devised all her estate to her husband, the appellant in fee; and she directed her trustees to convey her trust estate to such uses and purposes as were named in her will. She also gave all her personal estate to her husband, and made him the sole executor, and died.

Her son died in infancy without issue, and the appellant,

apprehending that he was by the will entitled in equity to the fee of the estate, and to have a conveyance of the legal estate from the trustees, filed his bill, in 1724, against the heirs of his wife and against the trustees, praying for a conveyance of the legal estate.

Lord Chancellor King dismissed the bill, on the ground that the appellant's remedy, if any, was at law.

On appeal from this decree, it was a point assumed that, if the will was a good execution of the power, it was well executed in favor of the husband. The objection was that the power was not well executed by will, because a feme covert's will of land was, by law, void. The decree was reversed, and an order made that the Court of Chancery take the opinion of the K. B., whether the will was a good appointment of the estate. It appears that the Court of Chancery ordered a case to be settled for the opinion of the K. B., and we have no further report of the case. But in Hearle v. Greenbank, 1 Vesey, 305, and in Peacock v. Monk, 2 Vesey, 190, Lord Hardwicke cited the case to prove that a feme covert might execute a power; and it was stated by the counsel, arguendo, in Marlborough v. Godolphin, 2 Vesey, 64, that, in the K. B., where the case was sent, it was held a good appointment.

Though this case was by a very unusual step referred to a Court of law, yet we must understand the decision to have been that the will was a good execution of the power in equity. The case was depending before an equity tribunal, to be decided upon equity principles; and Lord Hardwicke, in referring to that case, says that the point had been so determined "in this Court." At law, such a will is void; and in the very case of Peacock v. Monk, we find a decision of C. J. Willes cited, in which it was held, after a consultation with the other judges, that the husband could not give power to his wife to make a will of land. This determination meant, and it could only mean, that the devise of a feme covert, though made in pursuance of a power, was, equally with a will made without such power, void in a Court of law.

This early case may, therefore, I apprehend, be relied on as a decisive authority in favor of the equitable title of the husband under his wife's will, executed in pursuance of a power created previous to her marriage, and that such a title may be enforced

in equity against the heirs-at-law of the wife. The idea that the husband is in such a case to be deemed a volunteer, seems to be without foundation; and, though it was mentioned by the counsel for the respondents, the decision of the Court of Appeals shows that the objection did not apply. But, in that case, the estate of the wife had been conveyed, previous to her marriage, to trustees, in trust for such persons as she should by deed or will appoint. The case is not, therefore, in all respects applicable to the one before me; and the doctrine in Peacock v. Monk is supposed to be fatal to the present claim.

The principal question in Peacock v. Monk, 2 Vesey, 190, was as to the validity of the wife's will of land purchased by her during the coverture; and the observations of Lord Hardwicke, on which great reliance is placed, were mere dicta, not necessarily arising out of that case; and so they were considered, afterwards, in the case which I shall presently mention, before Lord Northington. Lord Hardwicke admitted that "a woman on her marriage may take such a method as to prevent her real estate from going to her heir;" but he doubted whether it could be done but either by way of trust, or of power over a "Suppose," he says, "a woman having a real estate beuse. fore marriage, and either before or after marriage, by a proper conveyance (if after marriage it must be by fine), conveys to trustees, in trust for herself during coverture, to her separate use, and then in trust for such person as she by deed or will should appoint, and, in default of appointment, to her heirs; she marries, and makes such an appointment. It is a good declaration of the trust, and this Court will support that trust. So it may be done by her, by way of power over a use, as if she conveyed the estate to the use of herself for life, remainder to the use of such person as she by writing, &c., should appoint, and, in default of such appointment, to her own use. This is a power reserved to her, and a feme covert can execute a power. a feme covert do this so as to bar her heir, by a bare agreement, without doing anything to alter the nature of the estate? Can a woman, having a real estate before marriage, in consideration of that marriage, enter into an agreement with her husband, that she may, by writing or by will, dispose of her real estate? This rests in agreement, and if she does it, though it may bind her husband from being tenant by the curtesy, that arises from his

own agreement; but what is that to her heir? She is a feme covert, under the disability of coverture, at the time of the act done; and, if she attempts to make a will, the instrument is invalid. The only question that could arise would be, whether such an agreement between her and her husband would not give her a right to come into equity, after marriage, to compel her husband to carry it into execution, and to join with her in a fine to settle the estate on such trust, or to such and such uses. And if it is such an agreement as the Court would decree to be carried further into execution by a proper conveyance, then the question may be, whether the heir is not to be bound by the consequences of that agreement."

It is then admitted, in this case, that a wife's will of land may be good in equity, by way of execution of a power, provided the wife, previous to the marriage, conveyed the estate in trust, for purposes to be declared during her coverture, by deed or will; or, provided she previously raised a use, and reserved to herself a power over it.

Lord Hardwicke only suggests doubts whether a mere antenuptial agreement between husband and wife, while the legal estate remains in her, can give her such a power of disposition during coverture. It appears to me that this doubt turns more upon a point of technical formality than upon any solid ground of distinction, or real principle adapted to the interest of families, or apparent to the good-sense and understanding of mankind. Why should not the heir himself, as well as the formal trustee standing behind him, be bound to give effect to the power of appointment reserved to the wife?

The case of Bramhall v. Hall, Amb. 467, first brought up the question upon such an agreement, without any conveyance by the wife.

Articles were entered into between Bramhall and his intended wife, who was then a widow seised of an estate in fee, by which he covenanted that she should have power, by deed or will, to dispose of her estate, after her decease, to any person whatsoever, and that he would do any act to confirm it. After marriage, the wife, by lease and release, reciting the articles, conveyed her estate to trustees, after her death, to the use of her natural son for life, with remainders over. Lord Northington held, that, the wife having the legal estate in her, the conveyance was not

good to pass the estate, either as a conveyance or an execution of the power.

This short and very imperfect note of the case is all we have in the report; and it would seem from it that the Chancellor put the objection on the ground of the legal estate not having been conveyed in trust, or to uses. But in the next case that followed it, and decided only a few months afterwards, Lord Northington, referring to this case, says he was of opinion that there was no meritorious consideration. It was upon this ground, then, that the case was decided; and so it has been viewed by Mr. Sugden, in his accurate "Treatise of Powers," p. 151.

It may then be considered as an authority in favor of an appointment by a feme covert resting upon an antenuptial agreement, and without having, prior to the marriage, parted with the legal estate. If the power had been void, the Chancellor would not have recurred to the want of merit (for so I understand him) in respect to the object of the appointment or bounty. If the husband had been the grantee, no such objection could have been made, according to the case before Lord King; and that case, in connection with this, would seem to contain all the principles requisite to support the present bill.

But in the case of Wright v. Englefield, Amb. 468; 6 Bro. P. C. 156, s. c., which was decided in the same year, and which is more generally known and cited by the name of Wright v. Cadogan, Lord Northington gave the subject a deeper investigation.

In this case, marriage articles were entered into between the intended husband and wife; and the instrument recited the intended marriage, and that it was agreed that the wife's existing estate, which was described to be a copyhold estate of inheritance, and a rent-charge for life, together with all such estate, real or personal, as might descend or come to her during coverture, should be to her separate use, and to be applied as she by deed or will should direct. The husband covenanted with S. and B., who were also parties to the same article of marriage, that her property should be so subject to her disposition, and that he would execute any deed to secure the same to her separate application and use. A moiety of a trust inheritance, of which the legal estate was then outstanding in the defendants as

trustees, and of which she had, when the marriage articles were made, a trust of the reversion in fee, descended to her after the marriage; and the case says that she then became "entitled in fee-simple possession" to her moiety, subject to the performance She afterwards made her will, and under of certain trusts. the power reserved, and to which she referred, she devised her moiety of the inheritance to trustees, to the use of her husband for life, remainder to the sons of the marriage in tail male, remainder to the daughters of the marriage in tail general, and, in default of such issue, to her own right heirs. The plaintiff was her only son by a former husband, and the question was between him, as her heir-at-law, and the second husband and his surviving daughters, who all claimed by appointment under the will and the marriage articles. He filed the bill to have a conveyance from the trustees, and they filed a cross-bill for directions.

Lord Northington held that the will, in connection with the articles, was a good and valid appointment in respect to the husband, as well as in respect to his children; and though he is made to say, according to the case in Ambler, that the provision, being for children, was meritorious, yet, by the decree, the provisions in the will were equally carried into effect in favor of the husband. He said that, "if a woman, before marriage, retains a power over a legal estate, to be exercised by way of execution of a power, she may do it."

The heir carried an appeal to the House of Lords, on the ground that the appointment was void as against him; and his counsel insisted that the only mode of enabling a feme covert to dispose of her inheritance was by a conveyance before marriage to uses or trusts, reserving such a power, or else by fine after marriage, with a deed to lead the uses of it, reserving such power to her over the inheritance. They said that unless one of those methods was taken her will of real estate was void and could not bind her heirs, though it bind the husband who was a party to the marriage articles; that, in this case, the power rested only in covenant, or upon articles between the husband and wife, without any estate vested in trustees, out of which an appointment by virtue of the power was to enure. The counsel for the respondents, on the other hand, urged, that as the legal estate was already in trustees, any formal conveyance would have

been a mere declaration of trust, and the reasonableness of the provision in the will was also urged.

The decree was affirmed, and, from the argument of the appellant's counsel (who were no less men than De Grey and Yorke), it is evident that they did not consider this case as satisfying the rule in Peacock v. Monk, requiring the wife before marriage to convey the estate in trust, or to use, with a power reserved to direct the uses or trusts. Lord Hardwicke clearly alluded to the solemn act and deed of the wife herself altering her estate before marriage, and by her own free act raising uses and trusts for future purposes, as being requisite to sustain the power; and so did the distinguished counsel in the above case. Here was no such act. of hers, and nothing but simple marriage articles between her and her husband, as in the present case; and if they be sufficient in all cases in which the wife is seised of any trust, inheritance, or reversion, to support her will during coverture, the force of the objection is gone. I consider this case, then, as containing the principle, that equity will carry into effect the will of a feme covert, disposing of her real estate in favor of her husband, and to relatives who are not her heirs-at-law, provided that will be in pursuance of a power reserved to her in and by the antenuptial agreement with her husband. It is said, however, that the conveyance of her estate in reversion would have been only a mere declaration of trust, and, therefore, useless; but might she not have transferred her interest, equally as if it had been a legal estate, to another person, subject to such uses as she should afterwards during coverture by deed or will declare? She might have done some act varying her equitable interest, and creating new trusts, so as to have satisfied the scruples in the case of Peacock v. Monk. But this was not done or required in the above case; and I think, Lord Kenyon was justified in referring to that case (see Doe v. Staple, 2 T. R. 695) as evidence that the doubts of Lord HARDWICKE had been removed; and that a bare agreement by marriage articles was sufficient to support the will, even against the heir; and Mr. Sugden ("Treatise of Powers," p. 151) cites it as evidence of the same fact. It was said, in the argument of the present case, that Lord Kenyon must have misunderstood the report of the case of Wright v. I should doubt that exceedingly. He was very Cadogan. familiar with equity principles and practice, and probably under-

stood the case much better than those who have only the printed reports as a guide; for he had been several years at the bar when that case was argued and decided in the House of Lords, and he speaks of the very able discussion it received in that house. The case of Rippon v. Dawding, Amb. 565, puts the question completely at rest. In that case a widow was seised of a freehold estate, and, previous to her second marriage, her husband gave a bond empowering her to dispose of her freehold estate, by deed or will, notwithstanding the coverture. The wife afterwards by will gave her estate to her younger children in fee, who exhibited their bill against the heir, to have a conveyance of the estate. The case of Wright v. Lord Cadogan was cited as being in point for the principle there determined, which was the performance of the marriage agreement as against the heir. The other side contended that the case of Wright v. Cadogan differed from the other, inasmuch as in the one case the legal interest was in trustees, and in the other it remained in the wife.

Lord Campen held that, though the two cases differed, in respect that the wife had only an equitable interest in the one and the legal interest in the other, yet the principle of determination was the same in both; and that, as the Court decreed performance of the agreement in Wright v. Cadogan, which was a trust-interest, it will do so in this, which is the case of a legal interest. He accordingly decreed a conveyance.

This decision was made in 1769, and it has never been directly questioned, and certainly not overruled.

In Compton v. Collinson, 2 Bro. Ch. 383-385, it was admitted by the counsel for the plaintiff that, if there be an agreement, prior to marriage and in consideration of marriage, that the wife might dispose of her own property, it would have been held good in equity, and the wife would have been competent to have bound herself as to those rights which the marriage gave her, against the heir of the husband. The counsel on the other side, and who represented the heir-at-law, also admitted that a covenant before marriage would have given the wife a power to dispose by will. Such language of counsel on each side is very good evidence of the general sense of Westminster Hall on this point of law, and that the cases in Ambler were received as decisive authority. Nor do I apprehend that there is anything

in Hogden v. Lloyd, 2 Bro. Ch. 534, to weaken the force of this conclusion.

In that case, marriage articles were entered into by which the real estate of the wife was to be settled to the joint use of the husband, wife, and upon the survivor for life; and that, if she survived him, her estate was to be settled to her own use, and, if not, the estate was to be at her own disposal. On the same day, and previous to the marriage, she made her will, and gave her intended husband all her estate, absolutely, and made him sole The marriage took place afterwards on the same day. executor. She died without revoking or altering the will, and the husband The question arose between the devisee of the took possession. husband and the wife's heir-at-law. Lord Thurlow held that articles resting in agreement gave the husband an equitable estate for life; but that the will was revoked by the subsequent marriage. The great point was whether the will was a good execution of the power. The Chancellor said the will was not well made under the power, because the power was to make a will after marriage; but, in the course of his opinion, there is this observation thrown out, that, "with regard to chattels, the husband, by contract anterior to the marriage resting only in agreement, could authorize her to make a will; but, in order to make a will of real estate, he must part with the legal estate to trustees by agreement; whilst resting in agreement only, he cannot bind the heir."

I believe that here is a mistake in the report; for the observation is directly against the decision in Rippon v. Dawding, which was cited upon the argument, and not questioned by the counsel for the heir-at-law. They put the objection to the will on the ground of a revocation by marriage, and that it was not in pursuance of the power, because the power referred to an act after marriage. Lord Thurlow repeats the same argument; whereas, if the agreement was insufficient to support a will after marriage, by way of appointment, the case would have been put upon that ground, and have cut short much discussion. Lord Thurlow did not so much as notice the case of Rippon v. Dawding, which was cited upon the argument, and which he certainly would have done out of self-respect, at least, if he had meant to question and much more to overrule it. It ought farther to be observed, that the counsel on each side in this case

also cited the decision in Wright v. Cadogan, as proving that an agreement before marriage would support a subsequent disposition; and the Attorney-General (who was afterwards Lord ALVANLEY) considered it as resolving the doubt of Lord HARD-WICKE, whether a mere agreement, or articles executory, would operate as a conveyance. He stated the rule to be, that there was no distinction in that Court as to the power of a feme covert, whether the estate be a legal or a trust estate, and that articles would convey to her a power of disposing of either during her marriage.

The most accurate writers who have discussed this subject, such as Sugden (Treatise of Powers, 151, 152), Powell (Wood's Conveyancing, by Powell, vol. 2, p. 6), and Atherley (Treatise on Marriage Settlements, pp. 336, 337), consider the doubts of Lord HARDWICKE as clearly resolved or removed by the subsequent cases which we have been considering. They all unite in opinion that it is not now necessary that the legal estate should be vested in any indifferent person as a trustee; and that, if the intended husband should covenant or agree that the wife might dispose of her estate, it would enable her to do so in equity. "By a mere agreement," says one of them, "when entered into before marriage, a feme covert may dispose, in equity, of her real estate." If such writers are not to be cited as authority (though Powell was much relied on in a Pennsylvania case), they are at least good in evidence of the sense of Westminster Hall, and very conclusive evidence that the case of Rippon v. Dawding has never been shaken.

The question raised in this case was also fully discussed by the Supreme Court of Pennsylvania (2 Dallas, 199; 1 Yeates, 221, s. c.), and the Court professed to decide the case before them upon the settled principles of the English Court of Chancery.

The wife, in that case, before marriage, entered into articles of agreement with her husband and one J. W., by which it was agreed that her estate should be for their joint use during coverture, and, if she should survive him, the whole estate was to remain to her as if no marriage had taken place; and that she should have power, by will, to dispose of the same to such persons and for such uses as she should see fit. The husband covenanted with J. W. to suffer this power to be carried into effect. She married without having conveyed the estate to trustees, and.

had no issue, and by will devised her estate to her nephews and nieces. The point was, whether the will was sufficient to bar the heir-at-law.

It was held by all the Judges (and the Court then consisted of M'KEAN, C. J., SHIPPEN, YEATES, and BRADFORD, JJ.), that the will operated as a good appointment under the articles, and that the heir was bound without any legal estate being vested in trustees.

The cases of Wright v. Cadogan and of Rippon v. Dawding were considered as governing the case and settling the law; and the Chief Justice admitted that the spirit of the former of those two decisions implied the same doctrine with the latter.

The counsel for the plaintiff endeavored to take this case out of that of Rippon v. Dawding, on the ground that the devisees there were not volunteers, and that the provision there for the younger children was meritorious.

Two of the cases already examined sustained the provision for the husband; and, if further authority was wanting to show that a provision for him is deemed meritorious, and that he is not regarded as a volunteer, we have it in Sergeason v. Sealey, 2 In that case a widow had a power, under former Atk. 412. articles, of disposing of 4,000l. by deed or will, executed in the presence of three witnesses, to any person she should appoint. Previous to her second marriage, she, by articles executed in the presence of two witnesses only, appoints the sum of 2,000l. out of the 4,000l. to be for the use and benefit of her intended hus-The remaining 2,000l. she made a voluntary disposition of, by will, but did not execute it in the presence of three witnesses. Lord HARDWICKE held that the articles upon the second marriage was a good appointment within the power, and though it was a defective appointment, because of two witnesses only, yet the Court would supply the defect where it was executed for a valuable consideration. But as the appointment of the remaining 2,000l. was not for a valuable consideration, but only a voluntary disposition, the defect in not proving the power was not to be aided; and it was, accordingly, as to that last sum deemed a void appointment.

So, Lord Eldon, in Parks v. White, 11 Vesey, 222, when speaking of the power of disposition of a feme covert over estates settled to her separate use, observed, that "the Court had no

difficulty in supposing that a woman, having such an interest, might give it to her husband as well as to any one else. cases never intended to forbid that; and, if he conducts himself well, I do not know that she can make a more worthy disposition; though, certainly, the particular act ought to be looked at with jealousy." Indeed, it is a clear point throughout the books that a married woman, having a power which is a right to limit a use, may appoint to her husband, in like manner as the husband may appoint to her. The case mentioned by CREW, C. J., in Latch's Rep. 44; Halder v. Preston, 2 Wils. 400; Gilbert's Uses and Trusts, by Sugden, 150, note. In the case of the Methodist Episcopal Church v. Jacques 1 (decided in October, 1817), in which the power of the wife over her property was largely discussed, it appeared that the gifts to the husband had been constantly sustained; and the only check to them suggested in the cases is, that they were to be more narrowly inspected, on account of the danger of improper influence. If duly made in pursuance of the power, and at the same time fairly made, there is no pretence, in any of the cases, that a gift to the husband is not to be supported.

There is no ground for the suggestion that a husband, who takes under a will founded on marriage articles like those in the present case, is a mere volunteer without consideration. The principle is well established (Marlborough v. Godolphin, 2 Vesey, 78), that, where a person takes by execution of a power, he takes under the authority of that power. The meaning is, as Lord Hardwicke expresses it, that the person takes in the same manner as if the power and instrument executing the power had been incorporated in one instrument, and as if all that was in the instrument executing had been expressed in that giving the Now, the marriage articles are founded on the consideration of marriage, which is a good and valuable consideration; and the provision in the will is founded on the same consideration as if it had been a part of the original antenuptial contract. The party who claims under the execution of a power, makes title under the power itself. The husband is frequently called the next friend and nearest relation to the wife; he has a right to administer, and he takes her personal property, according to Lord Thurlow (3 Bro. 10), on that ground, and not on that of

¹ 3 Johns. Ch. 77.

his marital rights. It is a general rule, that equity will execute marriage articles, at the instance of all persons who are within the influence of the marriage consideration; and Lord Maccles-FIELD, in Osgood v. Strode, 2 P. Wms. 255, considered the husband and wife and their issue as all within the influence of that consideration. A late case in chancery, Sutton v. Chetwynd, 7 Merivale, 249, only held, that a covenant or limitation in marriage articles to strangers and to a brother was merely voluntary, and not to be protected and rendered valuable by the consideration of marriage.

Though I concur in the intimation of Lord Eldon, that the husband's claim to his wife's bounty is to be closely inspected, and wholly free from symptoms of coercion and undue influence, yet in a fair case, like the present, which has no such imputation, and where there were no offspring to claim a divided attention, I think the wife's bounty is reasonable and just. from the best of human ties, and is founded on the warmest affections of the heart. There is less danger of improper influence exercised over the wife in case of an appointment by will than by deed; because a will, made in execution of a power, still retains all the properties of a will, and is revocable at the pleasure of the wife. Nor is there any weight in the objection, that the will makes no reference to the marriage articles. It is still in this case a good execution of the power. The rule, as declared in Sir Edward Clere's case, 6 Co. 17 b, and in many subsequent cases (2 Bro. Ch. 300, 301, 303), and Bennet v. Aburrow, 8 Ves. 609, is, that, if a will be made without any reference to the power, it operates as an appointment under the power, provided it cannot have operation without the power. the act can be good in no other way than by virtue of the power, and some part of the will would otherwise be inoperative, and no other intention than that of executing the power can properly be imputed to the testator, the act, or will, shall be deemed an execution of the power, though there be no reference to the power. Here the will can have no effect without the power, not even as to personal property; and if the power operates upon it at all, it operates equally upon every part of the disposition.

My conclusion accordingly is, that the plaintiff is entitled to the relief sought by the bill; and I shall decree that the defendants execute and deliver to the plaintiff, at his expense, a release in fee, to be approved of by a master, of their legal right and title, as heirs of the testatrix, to the house and lot in the bill mentioned; and that, as to such of the defendants as have not answered, and may not be within the jurisdiction of the Court, that they be perpetually enjoined from asserting or enforcing their title or claim, as heirs aforesaid, to the same; and that no costs be allowed by either party as against the other.

Decree accordingly.

MARTIN v. MARTIN.

(1 Me. 394. Supreme Judicial Court of Maine, 1821.)

Deed from Husband to Wife. At Law.

THE appellee filed his petition in the Probate Court, for partition of the real estate of which his father died seised, and the Judge thereupon decreed that partition be made. From this decree the mother of the petitioner appealed to this Court, and filed the following as the cause of her appeal. "Because Ezekiel Martin, her husband, on the 20th day of June, 1808, being then in full life but since deceased, by his deed of bargain and sale, with general warranty, duly acknowledged July 28, 1818, and recorded, for the consideration of four hundred dollars therein acknowledged to have been received of said Mary, did give, grant, bargain, sell and convey to said Mary, and her heirs and assigns forever, in fee, the land described in the petition aforesaid, by force of which deed she became and still is sole seised and possessed of said land in her own demesne as of fee," &c. And the question was upon the effect of this deed.

Greenleaf, for the appellant. No other reason is given against the validity of a deed of conveyance from the husband directly to the wife, but this, that they cannot contract with each other, being in law but one person. But this maxim is not universally true, and the reasons on which it is founded do not apply to cases like the present. The incapacity of a feme covert arises not from her want of skill and judgment, as in the case of an infant; but, first, from her husband's right to her person and society, which would be violated if a creditor could arrest and take her away;

and, second, from his right to her property. 1. She may sue and be sued as a *feme sole* where the husband is banished (Co. Litt. 432 b), or has abjured the realm for felony (case of the wife of Weyland, cited in Co. Litt. 133 a), or is an alien enemy (Duchess of Mazarine's case, 1 Salk. 116; 1 Ld. Raym. 147; 2 Salk. 646). She may contract with her husband to live separately, and he cannot compel her to live with him again. Mrs. Lester's case, 8 Mod. 22; Rex v. Lister, 1 Stra. 478; Rex v. Mead, 1 Burr. 542. For in these cases he is understood to have renounced his marital right to her person.

2. Where the husband covenanted that she might enjoy, to her own use, her estates real and personal, and that he would join her in the surrender of her copyholds, her surrender without him was holden good. Compton v. Collinson, 1 H. Bl. 334; 2 Atk. 511. Husband gave his wife a note of 3,000l. to be paid if he should ever again treat her ill; and he did so, and the note was decreed in chancery to be paid. Reeve, Dom. Rel. 94, cites 2 Vent. 217; 2 Vern. 67. But even his right to her property has its limits. She may take separate property by devise; and, if no trustees be appointed by the will, the husband shall be trustee for her use. Bennet v. Davis, 2 P. Wms. 316. So of a legacy of stock. Rich v. Cockell, 9 Ves. Jr. 369. So of a gift from the husband to the wife. Moore v. Freeman, Bunb. 205. And she may even have a decree against him in respect of such estate. Cecil v. Juxon, 1 Atk. 278. She may accept a gift of personal ornaments from her husband. She may lend money to him, which his executors shall be bound to repay. Slanning v. Style, 3 P. Wms. 334; ib. 337. And she may bequeath her own personal property, of which she was endowed ad ostium ecclesia. Reeve, 145-150, and authorities there cited.

The reason of all these cases applies with as much force at law as in equity, viz., that the husband's right to her property is not thereby affected. The wife may also act in auter droit as a feme sole. She may be an attorney. Co. Litt. 52 a. Or a guardian, and her receipt separate from her husband is good. Reeve, 121, cites 13 Ves. 517. So if she have power to dispose of lands to whom she pleases, she may convey without her husband: Daniel v. Upley, W. Jon. 137, cited in note 6 to Co. Litt. 112 a; because, as Mr. Hargrave observes, "he can receive no prejudice from her acts." She may in such case convey to her husband.

Reeve, 120. She may be an executor; and, if a feme sole be appointed sole administrator, and take husband, he becomes joint administrator; but she alone may perform any acts which a joint administrator may perform. 1 Com. Dig. "Administration," D. She may also release her dower by her separate deed, subsequent to the husband's sale of the estate. Fowler v. Shearer, 7 Mass. 14.

From these authorities this general principle is deducible, that the wife is to be considered capable to act as a *feme sole* wherever the marital right to her person is not infringed, and wherever the estate of the husband can receive no prejudice from her acts.

Now what prejudice can his estate receive, or what right of his can possibly be infringed, by considering her as capable to take directly from him by deed? He may convey to trustees for her use. He may convey to a third person; and this person at the same time, in pursuance of a previous agreement, may convey to the wife, with the husband's assent, and it will be good at law against him and his heirs.

And yet divers deeds thus executed are to be taken as parts of one entire transaction. Holbrook v. Finney, 4 Mass. 566; Hubbard v. Cummings, 1 Me. 11. He may covenant to stand seised to her use; and the statute of uses, 27 Hen. VIII., vest the possession to her. Co. Litt. 112 a. And in all these cases the estate descends not to his heirs, but to her own. The coverture may well operate to suspend any remedy on the covenants in a deed from the husband to his wife, during the life of the husband; and this for the preservation of domestic peace, and of his right to her person, which would be infringed if she could imprison him; but this would not affect her capacity to take.

E. Whitman, for the appellee. It is sufficient answer to the argument on the other side, to say that the law of the land is otherwise. It has ever been considered as law here, from the first settlement of the country, that the wife was incapable to take by direct conveyance from her husband; and conveyances have been regulated accordingly. Indeed the intervention of trustees on all occasions proves that estates cannot be thus conveyed without them. No instance can be found of any attempt to support a deed like this. The same has been the common law of England from time immemorial. Lit. sec. 168;

Co. Litt. 112 a. And it is founded in good reason. It frees the husband from the constant importunity of the wife while he is in health, and from the effect of her influence over his mind when it becomes enfeebled by disease. If it were otherwise, this barrier which the presence of trustees interposes would be broken down, and every artful woman might disinherit the children of a former wife at her pleasure.

Greenleaf, in reply. The argument arising from the presence of trustees, as the protectors of a weak husband against the arts of an ambitious or an avaricious wife, is of little weight in the cause. Pliant trustees are as easily found as imbecile husbands; and a wife, artful or eloquent enough to obtain her husband's consent to convey, will always be able to introduce some convenient relative or friend of her own as a trustee. As to the course of decisions, no adjudged case directly to this point is to be found in the books. Dicta, indeed, to this effect are not infrequent; but, if the reason of the law does not support them why should they be treated as law? If the principle now contended for could operate to unsettle the titles to any estates, or to disturb vested rights, there might be good reason to reject it, and to adhere even to harmless errors rather than do mischief by correcting them.

But it does not go to disturb titles, it shakes no established principle or decisions, it abridges no rights; on the contrary, it vindicates the consistency of the law on this subject, and takes from it the reproach to which it is otherwise exposed.

Mellen, C. J., afterwards delivered the opinion of the Court as follows: The only question presented in this case is whether the deed from Ezekiel Martin, the late husband of the appellant, directly to her is a legal conveyance by which the estate passed from him to her. If any principle of common law is settled and perfectly at rest, it seems to be this, that a husband cannot convey an estate by deed to his wife. The appellant's counsel has not attempted to show any authority shaking this principle; and even the learned author of the treatise on Domestic Relations (though an able advocate for the rights of married women in regard to the control or disposition of property belonging to them) does not contend that such a deed would be an operative conveyance. On the contrary, he admits it would not. (See pages 89, 90.) The numerous cases cited by the counsel in sup-

port of the deed are principally chancery decisions; and those which are not such have reference to questions totally different from that now under consideration. Neither class of cases, then, can be relied upon as authorities in the determination of this cause. It can be of no use for the Court to disturb, or attempt to disturb, a legal principle which has never before been agitated in our Courts, or till very lately been even doubted. is not necessary for us to answer the inquiry which has been made, "why a deed from a husband to his wife should not be a valid conveyance," in any other manner than by observing that the law of the land declares such a deed to be a mere nullity. Accordingly, without a particular examination of the authorities cited on either side, we affirm the decree of the Judge of Probate, and direct the record and proceedings to be remitted to the Probate Court, that such further proceedings may be had therein as the law requires.

SHEPARD v. SHEPARD.

(7 Johns. Ch. 57. Court of Chancery of New York, 1823.)

Deed from Husband directly to his Wife, when sustained in Equity.

The bill stated that the plaintiff was the widow of Hazel Shepard, deceased. That before their marriage in May, 1806, Hazel Shepard, being seised of fifty acres of land, in Pittstown, and part of lot 8 in Hoosick's Patent, in Rensselaer County, executed a deed, dated April 12, 1806, reciting their intended marriage, and that, if they should purchase any real estate during their marriage, the plaintiff should have a right of dower in the same during her widowhood, and he released to her dower therein; "but no other right of dower to any other real or personal estate he then had, or might have by means of selling any real or personal estate he then had, and buying and paying therewith." The plaintiff, on the same day, executed a deed to Hazel Shepard, reciting their intended marriage, and releasing to him all right of dower in his estate, real or personal, by virtue of the intended marriage.

That after their marriage, on the 26th of December, 1808, Hazel Shepard executed a deed to the plaintiff (she being his wife), in consideration of natural affection, and to make provision for her when a widow, of a lot of land described, to hold during her widowhood. And, afterwards, on the 6th of January, 1817, Hazel Shepard, in consideration of natural affection, executed the deed to the defendant, his son, releasing to him the same land he had before released to the plaintiff.

That on the same day, the defendant, by deed, in consideration of \$1,000, released to Hazel Shepard forty-eight acres of the land described, during his life; and the defendant covenanted with Hazel Shepard that he would pay annually to the plaintiff, during her widowhood, the sum of \$60, or, at his election, the sum of \$400, in two equal annual payments, to commence from the day of the death of Hazel Shepard, if the defendant should so elect; and the payment of the annuity, or of the \$400, was to be on condition that the plaintiff should release to the defendant all right, as widow of Hazel Shepard, or by virtue of any deed, or otherwise, to the said estate of Hazel Shepard; and, if she refused so to do, the covenants of the defendant were to be void.

The land described in the deed of the 26th of December, 1808, and that of the 6th of January, 1817, was the same land. Hazel Shepard died on the 25th of April, 1819, and the plaintiff remains his widow without any provision for her support. The defendant is in possession of the land described in the last-mentioned deed; and the plaintiff having brought an action against him, upon the deed from Hazel Shepard to her, the defendant set up in defence that the deed was void in law. The defendant never made his election to pay the plaintiff \$400. The plaintiff had offered to release to the defendant all her right to the estate of Hazel Shepard mentioned in the deed, provided the defendant would pay to her the annuity, which he refused to do.

No land was purchased by Hazel Shepard and the plaintiff during their marriage.

The defendant had the title-deeds and refused to assign to the plaintiff her dower.

Prayer, that the defendant be decreed to release to the plaintiff all his right to the land described in the deed of the 26th of

December, 1808, for her life or widowhood, to take effect as of the 28th of April, 1819, and to deliver the possession thereof, and account for the rents and profits from the death of Hazel Shepard; or, if the plaintiff should so elect, that the defendant be decreed to pay to her the annuity during her widowhood, upon her releasing to him all her right in the land; and that he secure such annuity by a mortgage on the land, or otherwise; or if that cannot be done, that the defendant be decreed to assign to the plaintiff her dower, and account for the mesne profits, &c. The defendant, in his answer, admitted the deeds as stated in the bill; and that the deeds between Hazel Shepard and the plaintiff, before their marriage, were in his possession. insisted that the deed of the 26th of December, 1808, from Hazel Shepard to the plaintiff, was void. That the covenants of the defendant in favor of the plaintiff were without consideration. That on the 11th of October, 1817, Hazel Shepard being indebted to him, on various accounts, Hazel Shepard, in consideration that the defendant would discharge him from those demands, agreed to discharge the covenants; and mutual releases were accordingly executed.

He admitted that he had made no election to pay the plaintiff \$400, or the annuity, and insisted that he was not bound to make an election; that the yearly value of the lands is not \$60.

He admitted that he had refused to assign to the plaintiff her dower, and submitted that her claim was matter of law, and triable at law, and not in Chancery. He alleged that the consideration of the deed of Hazel Shepard to him, was \$25, which he paid; and the life-estate was conveyed to Hazel Shepard in the premises.

The cause was heard on the bill and answer.

J. Paine, for the plaintiff.

W. Raleigh, for the defendant.

The Chancellor. The plaintiff, upon the facts arising out of the bill and answer, claims the assistance of the Court, (1), to make effectual, according to the terms of it, the deed to her from her husband, Hazel Shepard, of the 26th of December, 1808; or, if that deed cannot be enforced as against the defendant, that then, (2), the defendant be decreed to pay to her the annuity of \$60, according to the terms of his covenant made to her husband on the 6th of January, 1817; or, (3), that her dower

in the real estate whereof her husband was seised, and which is now claimed by the defendant, be duly assigned to her, and that an account be also rendered to her of the rents and profits from her husband's death.

1. The deed from Hazel Shepard to the plaintiff was undoubtedly void in law; for the husband cannot make a grant or conveyance directly to his wife during coverture. Co. Litt. 3 a. And in equity the Courts have frequently refused to lend assistance to such a deed, or to any agreement between them.

Thus, in Stoit v. Ayloff, 1 Ch. 33, the husband promised to pay his wife 100l.; they separated; and she filed her bill for that sum. But the Court would not relieve the plaintiff, "because the debt was sixteen years old, and the promise made by a husband to a wife, which the Court conceived to be utterly void in law."

Again, in Moyse v. Gyles, 2 Vern. 385, Prec. in Ch. 124, the husband made a grant or assignment of his interest in a church lease to his wife. She brought a bill after his death to have the defective grant supplied; and the Court held the grant to be void in law, and dismissed the bill, as the grant was voluntary and without consideration.

So in Beard v. Beard, 3 Atk. 72, the husband by deed-poll gave to his wife all his substance which he then had or might thereafter have. Lord HARDWICKE considered the deed-poll to be so far effectual as to be a revocation of a will, by which the testator had given all his estate to his brother; yet that it could not take effect as a grant or deed of gift to the wife, "because the law will not permit a man to make a grant or conveyance to the wife in his lifetime; neither will this Court suffer the wife to have the whole of the husband's estate while he is living, for it is not in the nature of a provision, which is all the wife is entitled to." It is to be observed, that none of these cases were determined strictly and entirely upon the incapacity of the husband to convey to the wife according to the rule of law; and they do not preclude the assertion of a right in a Court of equity, under certain circumstances, to assist such a conveyance. The Court relied upon the staleness of the demand in the first case, and upon the want of consideration in the second, and upon the extravagance of the gift in the third, as also constituting grounds for the decree; and it is pretty apparent that, if the grant in

each case had been no more than a suitable and meritorious provision for the wife, the Court would have been inclined to assist it. In Slanning v. Style, 3 P. Wms. 334, Lord Talbot said, that Courts of equity have taken notice of and allowed femes coverts to have separate interests by their husbands' agreement, especially where the rights of creditors did not interfere.

And in More v. Ellis, Bunb. 205, articles of agreement executed between husband and wife were held binding, without the intervention of trustees. So in Lucas v. Lucas, 1 Atk. 270, Lord HARDWICKE admitted, that, in Chancery, gifts between husband and wife have often been supported, though at law the property is not allowed to pass; and he referred to the case of Mrs. H., and to that of Lady Cowper. And in the very modern case of Lady Arundel v. Phipps, 10 Ves. 146, 149, Lord Eldon held that a husband and wife, after marriage, could contract, for a bona fide and valuable consideration, for a transfer of property from the husband to the wife, or to trustees for her. sideration for the deed to the wife, in the case before me, was very meritorious. It was "natural affection, and to make sure a maintenance for the said Anna Shepard, wife and consort of Hazel Shepard, in case she should survive him." She had been induced, prior to the marriage, to release to Hazel Shepard all right and claim of dower to arise under the intended marriage; and the consideration for this release was an engagement on his part that she should have dower in any real estate to be purchased by them "by their prudence and industry during the cohabitation." But no estate was purchased by them by those means; and according to the literal terms of those deeds she was barred of her dower, without any substitute. The deed to the wife of certain lands, being part and parcel of his estate, for and during her widowhood, was, therefore, no more than a just and suitable provision, and one that a Court of equity can enforce consistently with the doctrine of the cases. defendant does not stand in the light of a creditor, or of a purchaser for a valuable consideration without notice, and we have none of the difficulties before us which such a character might create.

He does not deny notice of the existence of the deed to the plaintiff, when he received the deed of the same lands from Hazel Shepard, and he does not pretend that he gave anything more than the nominal consideration of \$25, though the consideration of \$1,000 was inserted in the deed. The fact that he did, on the day of the date of that deed, reconvey the lands to Hazel Shepard, his father, for life, and did annex thereto a covenant to pay to the plaintiff an annuity of \$60 during her widow-hood (and which he now says is more than the annual value of the land), is decisive evidence that he took the land of his father with knowledge of the equitable claim of the plaintiff, and with an engagement, on his part, to give her a reasonable compensation in extinguishment of that claim.

I conclude, accordingly, that the deed from the husband to the wife may and ought in this case to be aided and enforced by this Court. This would seem to be the most safe and effectual relief to her; and it is one that her husband intended, before the alienation of his affections.

The defendant would deprive her not only of her rights under this deed, but of all right and title to dower, by reason of her antenuptial release; and also of all compensation in lieu of dower, under his covenants, which were made to the husband, and by him subsequently released.

2. But if the deed of 1808 was out of the question, I should then have no difficulty in declaring that the defendant was bound to pay her the stipulated annuity, or the gross sum of \$400 in lieu of it, on her releasing all right and title, as wife of Hazel Shepard, to his estate as described in the deed to the defendant. The relationship between the husband and wife was sufficient to entitle the plaintiff to her action upon the covenant to her husband, and which was made for her benefit.

The consideration enured from the husband, and arose from the obligations of that relation; and the release of the defendant from his covenants by Hazel Shepard was fraudulent and void as respected the plaintiff, who had the sole beneficial interest in the covenants, and who was alone entitled in equity to release them. In Dutton v. Poole, 2 Lev. 210; 1 Vent. 318; T. Jones, 103; the defendant, in consideration that his father, at his request, would not cut and sell certain timber growing, promised to pay the plaintiff, his sister, 1,000*l*.; and it was held, after solemn argument, that an action of assumpsit lay at law in the name and on behalf of the sister, and the judgment was affirmed on error to the Exchequer Chamber. It was said that the beneficial in-

terest was in her, and she was the party who might have released.

Lord Mansfield, in Martyn v. Hind, Cowp. 443; Doug. 142, said that it was difficult to conceive how a doubt could have been entertained about this case of Dutton v. Poole. The same doctrine appears in the more early case of Starkey v. Mill, Sty. 196; and it has had the sanction also of Mr. Justice Buller, in Marchington v. Vernon, 1 Bos. & Pul. 101, in notis.

But it is quite unnecessary to dwell longer on this second point. The plaintiff is entitled to the use and enjoyment of the land contained in the deed, for and during her widowhood; and as the deed is void at law, and can only be sustained in a Court of equity, it becomes necessary that the remedy should be afforded here, and it forms a just and proper subject of equitable jurisdiction.

I shall, therefore, direct a reference to ascertain the net value of the rents and profits from the death of the husband on the 25th of April, 1819, to the date of the report; and that the defendant, within thirty days after notice of this decree, deliver up possession to the plaintiff of the premises contained in the deed to her, and included in the deed from Hazel Shepard to the defendant; and that the defendant, and all persons under him, be enjoined from disturbing the plaintiff, after she shall have obtained possession of the land, and been put into the pernancy of the future rents and profits, and in the enjoyment thereof, to her own use and benefit, during her widowhood; and that he pay to her the rents and profits so to be ascertained, within thirty days after the report made and confirmed, together with her costs of this suit, to be taxed, or that the plaintiff have execution therefor.

Decree accordingly.

SIMS v. RICKETS, 35 Ind. 181. — APPEAL from the Howard Circuit Court. Buskirk, J. This action is founded on two written instruments: 1, a deed of conveyance of the real estate in controversy; and, 2, a will subsequently made by the grantor in the deed. The material facts charged in the complaint are these: That Clement G. Rickets, being the absolute owner, in fee, of the premises described in the complaint, on the 12th day of January, 1856, by a general warranty deed, conveyed the said premises, in fee, directly to Mary Rickets, who was then his wife; that the said Rickets, on the 8th day of May, 1856, made his last will and testament, and that, on the 17th of the same month, he added a codicil thereto; that, by the said will, he bequeathed

to his wife certain personal property therein described, and an annuity of \$365, payable semi-annually, and directed that the said sum of \$6,083.33 should be invested by his executor for the purpose of raising such legacy; that, in the event the said annuity should prove insufficient for the comfortable maintenance of his wife during sickness or ill-health, his executor was directed and authorized to invest such other sum as, in his discretion, should be necessary for that purpose, and to pay her the interest of said sum whenever, in his discretion, her necessities might require it; that, by the codicil to the said will, the executor was directed to pay his widow, as soon after his decease as should be convenient, the further and additional sum of \$1,000, with interest thereon from the date of his death to the time of the payment, which money was to be used by her in purchasing for herself a private residence; that the said will, after making certain specific legacies to his brothers and sisters, contained the following clause, namely: "Fifth. I give and bequeath all the rest, residue, and remainder of my estate, real, personal, and mixed, to be equally divided between my brothers and sisters, or their heirs, - except Letitia; that is to say, the said residue is to be divided into eight equal parts, and one part thereof I give and bequeath unto the children of my deceased sister, Sarah Courtright." Then follow the names of seven of his brothers and sisters, to whom or to whose heirs, when they are dead, he gives and bequeaths one equal eighth part of the residue of his estate, in the same language in which he gives and bequeaths to the children of his deceased sister Sarah, except as to the names; that by the sixth clause of his will he authorized and empowered his executor to sign, seal, execute, and acknowledge all such deeds of conveyance as might be necessary to the granting and conveying to the purchaser or purchasers all of all such lands as he might contract for the sale of in his lifetime; that it was further provided by the said will, that, upon the death of the said Mary Rickets, the sums which he had directed to be invested to raise the legacies for her should be divided in the same manner, and paid as is directed in the fifth clause of his will, in which he had disposed of the residue of his estate; that the said Clement G. Rickets departed this life on the 22d day of March, 1858, in Columbia County, Pennsylvania, leaving surviving him the said Mary Rickets, as his widow, but leaving no child, father, or mother him surviving; that the deed of conveyance from the said Rickets to his wife Mary was recorded in the recorder's office of Howard County, in the State of Indiana, where the lands conveyed are situated, on the 12th day of May, 1858; that the said deed was executed in Columbia County, in the State of Pennsylvania, and the consideration expressed therein was the sum of one dollar; that the said Mary Rickets has, from the date of the said deed of conveyance, had and held the same, and that since the death of the said testator she has exercised, and still exercises, absolute control of the said premises, and pretends and claims to be the absolute owner thereof; that the plaintiffs are the brothers and sisters, and the descendants of such as are dead, of the testator, and are the persons referred to and named in the residuary clause of the said will; that the deed of conveyance is absolutely void, by reason of the fact that when the same was made the grantor and grantee were husband and wife; that the said deed being void, no title passed

to the said Mary Rickets; and that the title to the said premises remained in the said Clement G. Rickets until his death, when the title thereto became and was vested in the plaintiffs, under and by virtue of the residuary clause of the said will. The prayer of the complaint was, that the said deed of conveyance from the said Clement G. Rickets to the said Mary Rickets be set aside and cancelled, and that the plaintiffs recover the possession of the said premises, and \$1,000 damages for the use and occupation thereof. Copies of the deed and will were filed with, and constitute parts of, the complaint. The appellee demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and, the plaintiffs refusing to amend, the Court rendered judgment for the defendant. Proper exceptions were taken to these several rulings, and the only error assigned here is upon the action of the Court in sustaining the demurrer to the complaint.

It is quite obvious that if the deed is valid, and conveyed an estate in feesimple, absolute and unconditional, to the grantee therein named, the grantor could have no power to make a subsequent bequest of the same premises, he having already parted with his title thereto by deed; and that, therefore, if the deed set out in the complaint be a valid one, the appellants who claim title to the premises by virtue of the will of Clement G. Rickets, who was the grantor in the said deed, can have no valid title to the said premises.

The validity of the deed is, therefore, the real question in the case. appellants claim that the deed was absolutely void, for the reason that it was made by a husband directly to his wife, without the intervention of a trustee. The appellee admits that the deed is void at law, but maintains that it will be upheld and sustained in equity. The adjudicated cases in this Court do not very clearly define when and in what cases equity will sustain a conveyance direct from husband to wife. This Court, in Bunch v. Bunch, 26 Ind. 400, say: "The deed to the land in question, executed by the defendant to the plaintiff, during their coverture, was void in law. This is not questioned by the plaintiff's counsel; indeed, the complaint praying that the title may be vested and quieted in her is based on the assumption that the deed is void at law, and appeals to the equity powers of the Court for its confirmation. Such conveyances, though void at law, are sometimes upheld and confirmed by Courts of equity. The confirmation of such contracts is not a right to be Such claims are addressed to the sound discretion of enforced in all cases. the Court, and are only confirmed after a most cautious examination, in clear cases, where such confirmation is demanded by the clearest dictates of right and justice."

We have made a very careful examination of the elementary works and decisions bearing upon this question. The decisions are not uniform and consistent with each other. It is important that some fixed and definite rules should be established, by which we are to be governed in the decision of such cases, as it is not safe to leave such questions to the mere discretion of the Court; for, in such case, the peculiar views or prejudices of the Judge would determine the rights of parties. According to the strict rules

of the old common law, the wife was not permitted to take and enjoy either real or personal property, independent of her husband. These rules were modified by the Courts of equity, and have recently been abolished by statute in this State. It is now the settled law in this State, and in the most of the States of the Union, that a wife may take, hold, and enjoy, to her sole, separate, and exclusive use, both real and personal property; and in this State she may encumber and alienate her separate real estate by her husband joining with her in the mortgage or deed. There is now no limitation upon the power of the wife to take and hold real estate by inheritance, devise, or purchase. The limitation is upon her power of alienation. This she cannot do, unless her husband joins with her in the conveyance. It is also the admitted doctrine in this State, that a married woman may contract in reference to her separate property; and while she may not create a personal liability, she may charge her separate property for a debt contracted in reference thereto. The disabilities imposed upon married women by the common law have been, to a great extent, removed by the principles of equity and the statutes passed to secure their rights. Even after the doctrine was established that a married woman might hold real estate to her separate and exclusive use, the rule was inflexible at common law that she could acquire no valid title by a conveyance direct from her husband; but the Courts of equity have modified the harshness of that rule. The rule that a wife could make no valid contract or agreement with her husband was based upon the same principle as the rule that she could not hold real estate, to her separate and exclusive use, independent of her husband. Both of these rules were established in consequence of the unity of person between husband and wife. legislation of this State has destroyed the unity in person between husband and wife, so far as their rights of property are concerned. The strictness and rigor of these old rules should be modified so as to conform them to the now well-settled rights of property between husband and wife.

STORY says it was formerly supposed that the interposition of trustees was, in all arrangements of this sort, whether made before or after marriage, indispensable for the protection of the wife's rights and interests. In other words, it was deemed absolutely necessary that the property of which the wife was to have the separate and exclusive use should be vested in trustees for her benefit, and that the agreement of the husband should be made with such trustees, or, at least, with persons capable of contracting with him for her benefit. But although in strict propriety that should always be done, - and it is usually done in regular and well-considered settlements, - yet it has for more than a century been established in Courts of equity that the intervention of trustees is not indispensable; and that whenever real or personal property is given or devised or settled upon a married woman, either before or after marriage, for her separate and exclusive use, without the intervention of trustees, the intention of the parties shall be effectuated in equity, and the wife's interest protected against the marital rights and claims of her husband, and of his creditors also. 2 Story Eq. 600, 601, sec. 1380.

In Sexton v. Wheaton, 8 Wheat. 229, where the validity of a post-nuptial voluntary settlement made by a husband upon his wife was in question, MARSHALL, C. J., says:—

"It would seem to be a consequence of that absolute power which a man possesses over his own property, that he may make any disposition of it which does not interfere with the existing rights of others; and such disposition of it, if it be fair and real, will be valid." Speaking of the case before him, he says: "The appellant contends that the house and lot contained in this deed constituted the balk of Joseph Wheaton's estate, and that the conveyance ought, on that account, to be deemed fraudulent. . . . If a man entirely unencumbered has a right to make a voluntary settlement of a part of his estate, it is difficult to say how much of it he may settle."

The doctrine is thus stated by the Supreme Court of the United States in Wallingsford v. Allen, 10 Pet. 583:—

"Agreements between husband and wife, during coverture, for the transfer from him of property directly to the latter, are undoubtedly void at law. Equity examines with great caution before it will confirm them. But it does sustain them when a clear and satisfactory case is made out that the property is to be applied to the separate use of the wife. Where the consideration of the transfer is a separate interest of the wife, yielded up by her for the husband's benefit, or that of their family, or which has been appointed by him to his uses; where the husband is in a situation to make a gift of property to the wife, and distinctly separates it from the mass of his property, for her use, -either case equity will sustain, though no trustee has been interposed to hold for the wife's use. In More v. Freeman, Bunb. 205, it was determined that articles of agreement between husband and wife are binding in equity, without the intervention of a trustee. Other cases may be cited to the same purpose. In regard to grants from the husband to the wife, an examination of the cases in the books will show that, when they have not been sustained in equity, it has been on account of some feature in them impeaching their fairness and certainty; as that they were not in the nature of a provision for the wife, or when they interfered with the rights of a creditor, or when the property given or granted had not been distinctly separated from the mass of the husband's property."

In Putnam v. Bicknell, 18 Wis. 333, it is said: "Though void at law, an absolute conveyance of real or personal property from the husband directly to his wife is good in equity, and sufficient, so far as the form is concerned, to divest the husband of such property, and to vest the same in the wife, as against all persons save the creditors of the husband, especially when the transfer is fairly made upon a meritorious or valuable consideration."

In Huber v. Huber, 10 Ohio, 371, it was held "that a husband may, during his life, settle a separate estate upon his wife; that is, he may (there being no claims of creditors to forbid it) transfer property to his wife in which she never had any beneficial interest, and which will enure to her as her separate estate. This may be done even without the intervention of a trustee. A Court of equity would, if necessary, appoint one to execute the intentions of the husband."

In Simmons v. McElwain, 26 Barb. 419, it is said: "It is true that the deed from the defendant to his wife was void in law; for a husband cannot, during coverture, make a grant or conveyance to his wife. But such a grant will be upheld in equity, when it is necessary to prevent injustice."

In Wilder v. Brooks, 10 Minn. 50, it is said: "And had the conveyance been made to any person other than his wife, and even for a merely nominal consideration, we see no reason why it would not have been completely unassailable. If these premises are sound, it follows that, if the instrument was effectual between Andrew M. Torbet and his wife to pass the property, it was good as to the world, and vice versa." Again, it is said: "Contracts of all kinds between husband and wife are objected to, not only because they are inconsistent with the common-law doctrine that the parties are one person in law, but because they introduce the disturbing influences of bargain and sale into the marriage relation, and induce a separation rather than a unity of interests. But, certainly, neither in reason nor on principle can it be contended that, so far as this objection is concerned, there is any difference between the cases of a conveyance by a husband to trustees for the use of a wife, or to a third person who conveys to the wife, or to the wife directly. Each of these would have precisely the same effect in conferring upon the wife property and interest, independent of and separate from her husband. And the tendency of modern legislation, as well as of judicial interpretation, is to improve and liberalize the marital relation, by recognizing and upholding the reasonable rights of both parties to the matrimonial contract."

The law is thus stated by the Supreme Court of Massachusetts, in the case of Whitten v. Whitten, 3 Cush. 191: "The like presumption exists in the case of purchase in the name of his wife and of securities taken in her name. Indeed Mr. Justice Story says that the presumption is stronger in the case of a wife than in that of a child. It is, therefore, an established doctrine that, when the husband pays for land conveyed to the wife, there is no resulting trust for the husband; but the purchase will be regarded and presumed to be an advancement and provision for the wife. This is fully supported by various cases, as well as by the best writers."

Mason, J., in the case of Stockett v. Holliday, 9 Md. 480, says: "The case of Bowie v. Stonetreet, 6 Md. 418, conclusively settles that a contract which can be enforced in a Court of equity may be entered into between a husband and a wife, for the transfer of property from the former to the latter, for a bona fide and valuable consideration."

The Supreme Court of Vermont, in the case of Barron v. Barron, 24 Vt. 375, states the law thus: "And, as a general rule, whenever a contract would be good at law when made with trustees for the wife, that contract will be sustained in equity when made with each other, without the intervention of trustees. It is upon this principle that, in many cases, the husband will be held as trustee of the wife, and the wife entitled to the privileges belonging to a creditor of the husband."

Though a stranger's conveyance of property or covenant to pay money to a married woman, or to a trustee for her, in order to give her a separate use, must contain words indicating such intention, it seems to be well settled that such words are unnecessary in the husband's conveyance or covenant. The law upon this subject is well stated by the Supreme Court of Connecticut in Deming v. Williams, 26 Conn. 226, where it is said: "Now had such transfers been made by a parent into the name of a child, the child would acquire the

interest as an advancement, such intent being inferred by law from the relationship of the parties. The same is true in case of a wife, where the husband purchases land and has the deed made directly to her, there being in the case no creditors, or fraud upon any other party. The law attaches to absolute deeds and transfers a full alienation of the entire interest or property, so far as the alienation is permitted by the principles of law or equity. Such are all gifts or deeds by husbands to wives of real or personal estate found in the books, from the case of Slanning v. Style (decided in 1734, and found in 3 P. Wms. 334) to the present time, and they are exceedingly numerous. They sustain the principle that, so far as the form and substance of the gift or alienation are important, that which would be good if made to a third person is good in a Court of equity if made by the husband to his wife."

We have had urged upon our attention and consideration the cases of White v. Wager, 25 N. Y. 328, and Winans v. Peebles, 32 N. Y. 423. We have given these cases a careful consideration, and are of the opinion that they are not in conflict with the views we have expressed. In both of those cases the question involved was the validity of conveyances from wives to their husbands. We have already seen that a married woman in this State is under a disability, so far as the alienation of her land is concerned. Her conveyance is absolutely void, unless her husband joins with her. Such is the law in New York. None of the disabilities imposed upon married women have attached to the condition of a married man, who was as free to receive the title to property and to dispose of it after marriage as before, with the exceptions that he could not receive a deed directly from his wife, because she could not convey without his joining, and he could not join in a conveyance to himself, and that he had no power to dispose of, or in any manner affect, the inchoate right of his wife in and to his real estate. As to the world in general, the estate of marriage does not affect his ability to acquire title to or dispose of his property, just as he might have done if he had not been married. These cases correctly held that a deed direct from a wife to her husband was void at law, and would not be sustained in equity; for the reason that this disability was imposed upon married women to protect them from the influence of their husbands.

The adjudicated cases in England are in entire accord with the decisions in this country. We refer to the following English and American cases on this subject, besides those heretofore referred to. Lucas v. Lucas, 1 Atk. 270; Freemantle v. Bankes, 5 Ves. 79; Battersbee v. Farrington, 1 Swanst. 106; Latourette v. Williams, 1 Barb. 9; Neufville v. Thompson, 3 Edw. Ch. 92; McKennan v. Phillips, 6 Whart. 571; Kee v. Vasser, 2 Ired. Eq. 553; Stanwood v. Stanwood, 17 Mass. 57; Phelps v. Phelps, 20 Pick. 556; Adams v. Brackett, 5 Met. 280; Jones v. Obenchain, 10 Gratt. 259; Walter v. Hodge, 2 Swanst. 97; More v. Freeman, Bunb. 205; Lady Arundell v. Phipps, 10 Ves. 139; Shepard v. Shepard, 7 Johns. Ch. 57; Wood v. Warden, 20 Ohio, 518; Gaines v. Poor, 3 Met. (Ky.) 503; Ward v. Crotty, 4 Met. (Ky.) 59; Livingston v. Livingston, 2 Johns. Ch. 237; Fitch v. Ayer, 2 Conn. 143; Cornwall v. Hoyt, 7 Conn. 420; Whittlesey v. McMahon, 10 Conn. 137; Morgan v. The Thames Bank, 14 Conn. 99; The F. E. Society v. Mather, 15 Conn. 587;

Winton v. Barnum, 19 Conn. 171; Hawley v. Burgess, 22 Conn. 284; Edwards v. Sheridan, 24 Conn. 165.

From the foregoing authorities the following propositions are fairly deducible:—

First. None of the disabilities imposed upon married women have attached to the condition of a married man, who is as free to receive the title to property and dispose of it after marriage as before, except that he cannot by his conveyance affect the inchoate right of his wife to his real estate.

Second. That a conveyance from a husband directly to his wife, without the intervention of a trustee, is void at law.

Third. That a direct conveyance from a husband to his wife will be sustained and upheld in equity in either of the following cases, namely: 1. Where the consideration of the transfer is a separate interest of the wife, yielded up by her for the husband's benefit or that of their family, or which has been appropriated by him to his uses. 2. Where the husband is in a situation to make a gift to his wife, and distinctly separates the property given from the mass of his property, and sets it apart to the separate, sole, and exclusive use of his wife.

Fourth. Where a wife advances money to her husband, or the husband is indebted to the wife upon any valid consideration, the wife stands as the creditor of her husband; and, if the conveyance is made to pay or secure such liability, the wife will hold the property free from the claims of other creditors, where the transaction is unaffected by unfairness or fraud.

Fifth. Whenever a contract would be good at law when made with trustees for the wife, that contract will be sustained in equity when made with each other, without the intervention of trustees.

Sixth. That, prior to the recent legislation in this State authorizing married women to hold real estate to their separate use, when a conveyance was made by a stranger to a married woman, or to a trustee for her, in order to give her a separate use in the property, it was necessary that such conveyance should contain words clearly indicating such intention; but such words were unnecessary in a conveyance from a husband to his wife, for the law presumed that it was intended for her separate and exclusive use.

Seventh. That section five of an act entitled "an act touching the marriage relation and liabilities incident thereto" (approved May 31st, 1852), made all property held by a married woman at the time of her marriage, or acquired by her subsequently, hers absolutely, and has enabled her to use, enjoy, and control the same independently of her husband, and as her separate property; and that, since the passage of that act, a conveyance to a married woman need not contain words indicating that she is to hold the property to her separate use.

Eighth. That when conveyances from a husband to his wife have not been sustained in equity, it has been on account of some feature in them impeaching their fairness and certainty; as that they were not in the nature of a provision for the wife, or when they interfered with the rights of creditors, or when the property given or granted had not been distinctly separated from the mass of the husband's property.

Ninth. That, in consequence of the absolute power which a man possesses over his own property, he may make any disposition of it which does not interfere with the existing rights of others.

Tenth. When a husband is free from debt, and has no children, and conveys property to his wife for a nominal consideration, the law will presume that it was intended as a provision for his wife.

Eleventh. That a conveyance from a husband to his wife which is good in equity, vests the title to the property conveyed in the wife, as fully, completely, and absolutely as though the deed had been made by a stranger upon a valuable consideration moving from the wife.

It appears by the record in this case that the grantor was possessed of a large property; that in his will he disposed of about \$8,000 in specific legacies; that the value of the property disposed of in the residuary clause is not shown; that he had no children, and, if he had died intestate, his wife would have inherited his entire estate; that the rights of creditors were not interfered with by the conveyance in question; that the great and commendable anxiety displayed in his will for the welfare, comfort, and happiness of his wife tends to show that the conveyance which he had made a short time before was intended as a provision for his wife; and that in making his will he had such conveyance in his mind, and did not intend to devise to his brothers and sisters the property which he had previously conveyed to his wife.

We are clearly of the opinion that the conveyance in question was good in equity, and should be sustained. The Court committed no error in sustaining the demurrer to the complaint.

The judgment is affirmed with costs.

LIVINGSTON v. LIVINGSTON.

(2 Johns. Ch. 587. Court of Chancery of New York, 1817.)

Post-nuptial Contracts between Husband and Wife, when sustained in Equity.

THE plaintiff, in May, 1809, married Eliza Oothout, who was seised in fee, in her own right, of a house and lot (No. 56) in Greenwich Street. After the marriage, the plaintiff expended \$2,500 in repairs and improvements on the house.

In April, 1814, the plaintiff and his wife agreed that he should purchase, in her name, another lot, and build a house thereon, and that the cost of erecting such new house should be paid out of the proceeds of the house and lot first mentioned, on a sale thereof for that purpose, to be made when the new house was completed. The bill stated that, in pursuance of this agree-

ment, the plaintiff, in May, 1814, purchased a lot (No. 51) in Greenwich Street, for \$6,000, which he paid out of his own money, and took a deed in his wife's name; that he erected a house on the lot, in the building of which he expended above \$16,000 of his own money. That, in September, 1815, he and his wife went to reside in the new house, and his wife, soon after, on the 21st day of the same month, died suddenly, while the plaintiff, with her concurrence, was in treaty for the sale of the first house and lot. That the wife of the plaintiff left two infant children, her heirs, to whom the legal estate in both houses and lots descended. The plaintiff alleged that, the consideration for the agreement between him and his wife having thus failed, he was entitled to avoid the agreement, and consider the children as trustees for the plaintiff in regard to the second house and lot. The bill prayed that the defendants might be decreed to release the last-mentioned house and lot to him, or that the same might be sold, and he be reimbursed the moneys he had so advanced, out of the proceeds of such sale.

The defendants, being infants, put in their answer by a clerk of the Court, as their guardian ad litem, and admitted only the seisin of their mother in the first lot, and her death. The plaintiff proved the material facts stated in the bill.

T. L. Ogden, for the plaintiff.

The CHANCELLOR. I entertain no doubt of the fairness and equity of the agreement between the plaintiff and his late wife, as stated in the bill, and proved by one of the witnesses.

A husband and wife may contract, for a bona fide and valuable consideration, for a transfer of property from him to her.

It was admitted as a clear point in the case of Lady Arundell v. Phipps, 10 Vesey, 146-149, that a married woman having separate property may purchase, by the sale of it, other property, even of her husband, and have it limited to her separate use. Other authorities to the same point are referred to by Atherly (Treatise on Marriage Settlements, pp. 160, 161), who considers the point supported by reason as well as by authority. Though the agreement here was by parol, yet it was carried into effect on the part of the plaintiff, and he has the clearest equity either to have the house and lot first mentioned sold, and the proceeds, or a part of them, paid over to him, or to have the second house and lot conveyed to him, on the ground of a failure of the con-

between them, the hardship to the plaintiff would have been more striking, in suffering the property in both lots to pass immediately to the wife's collateral relations; but the principle of equity would not have been different. The circumstance that the heirs of the wife are the children of the plaintiff, only gives a graver and more interesting character to the case.

The presumption would undoubtedly be, in the first instance, that the conveyance to the wife was intended as an advancement and provision for her. This presumption was admitted in the case of Kingsdon v. Bridges, 2 Vern. 67; but I do not see why it may not be rebutted, as has been done in this case, by parol proof. In Finch v. Finch (15 Vesey, 43), it was held, that though, when a purchase is made in the name of a person who does not pay the purchase-money, the party paying it is considered in equity as entitled, yet if the person whose name is used be a child of the purchaser it is, prima facie, an advancement; but that it was competent for the father to show, by proof, that he did not intend advancement, but used the name of his child only as a trustee. If the agreement had here been for an exchange of lots, I might thus have ordered the infant heirs of the wife to convey to the plaintiff the house and lot first mentioned; considering them as infant trustees, according to the case of Smith v. Hibbard, Dickens, 730. But the agreement was that the first house and lot should be sold, and the plaintiff reimbursed out of the proceeds for "the expense of erecting such new houses." This is the agreement as stated in the bill.

I presume I have power to carry this partly executed agreement into effect, under the third section of the act of the 9th of April, 1814,¹ entitled, "an act concerning infants;" and it appears to me that it would be more beneficial to the infants to have this agreement specifically executed, than to have the new house and lot conveyed to the plaintiff.

It must be observed that, upon the terms of the agreement, as stated by the plaintiff, he is only entitled to be paid, out of the first house and lot, the expense of erecting the new house, and which according to the testimony of the mason who built it was about \$11,000, though according to the carpenter's testimony the whole expense was upwards of \$12,000.

¹ Sess. 37, c. 108.

The prayer of the bill is that the infants may be decreed to convey to the plaintiff the house and lot last mentioned, or that the said house and lot may be sold. Strictly considered, the prayer is to have the last house and lot sold; and as there is no prayer for general relief, but only this specific prayer, I am the more particular in this criticism on the bill. I am content, however, to consider the prayer for a sale as alluding to the first house and lot, and I presume it was so understood; for the plaintiff has no pretext of right to have the last house and lot sold. The question, then, is fairly before me, which course ought to be pursued. If the release is to be adopted, it must be on the ground that the contract has failed, and that the infants hold the second house and lot for the plaintiff as a resulting trust, he having paid the purchase money. Infants have been ordered to convey a resulting trust after it was established by parol testimony; and it has been held by Lord Chancellor King, Ex parte Vernon, 2 P. Wms. 548, to be a trust within the statute of 7 Anne, c. 19, which we have adopted, relative to conveyances by infant trustees.

It was, however, afterwards doubted by Lord Talbot, in Goodwin v. Lister, 3 P. Wms. 386, whether constructive trusts were within the statute of 7 Anne, though he gave leave to the plaintiff to apply, in case any precedents could be found where such constructive trusts had ever been held to be within the statute. Lord Talbot, in that case, must have either considered a resulting trust not one of the constructive trusts to which he alluded, or he must not have known or recollected the decision of Lord King, and which, I think, ought to be considered as an authority. My difficulty is not as to a want of jurisdiction in case a resulting trust be established; but I think that a strict performance of the contract would be just as it respects the plaintiff, and more beneficial to the infants, and, therefore, it is the more advisable remedy.

I shall, accordingly, decree a sale of the house and lot first mentioned, under the direction of a master; that the sale be at auction, on due public notice, and the terms of it be reduced to writing, and the memorandum of it signed by the purchaser, and reported to the Court for its approbation; and that, when confirmed, the conveyance be executed by the infants by their guardian; that the plaintiff and the master unite in the conveyance;

that the moneys be brought into Court to abide its further order; that the same master ascertain and report the amount of the expense of the plaintiff in erecting the house on the last lot; and that the depositions taken in the cause be used by him as evidence, together with such other and further testimony as the plaintiff may think proper to furnish, and that he report such further testimony, together with his opinion as to the amount of such expense.

Decree accordingly.1

MARTIN v. DWELLY.

(6 Wend. 9. Court of Errors of New York, 1830.)

Deeds and Contracts of Femes Coverts, Effect of.

APPEAL from chancery. In February, 1827, the respondents commenced an action of ejectment for the recovery of certain premises in the possession of the appellant, claimed by them as the heirs-at-law of their mother Miriam Dwelly. The appellant filed a bill in chancery to obtain an injunction staying the suit at law, and to compel a conveyance from the respondents to him of the premises claimed. The appellant alleged that Miriam Dwelly, the mother of the respondents, was his sister, and one of eight children and heirs-at-law of Moses Martin, who died intestate in 1792, seised of various parcels of land; that, on the 19th of April, 1800, a settlement was agreed upon between the appellant and Abner Dwelly, the husband of Miriam, and the said Miriam herself, whereby Abner Dwelly and his wife agreed to sell and convey to the appellant one eighth part of the land whereof the intestate, Moses Martin, died seised, for the consideration of \$325; and, in pursuance of such agreement, conveyed the same to the appellant, under their hands and scals, and severally signed a receipt acknowledging the payment of that sum, which

the whole costs were charged on the party applying to have infant trustees convey.

¹ It was said, in Prec. in Ch. 284, that infant trustees convey by guardian after the conveyance is settled by a master; and, in 10 Vesey, 554,

was paid by the appellant, and which he stated he verily believed was applied to the use of the said Miriam; that Miriam Dwelly entered into the agreement, and executed the conveyance and release of the premises voluntarily, without any fear or compulsion of her husband; that the appellant took possession of the premises, using them as his own, selling and conveying away parts thereof, and occupying the remainder without interruption or molestation from Abner Dwelly and Miriam his wife, who departed this life, the said Miriam in October, 1825, and the said Abner in June, 1826, without having executed to the appellant a deed of the bargained premises duly acknowledged, according to the provisions of the act in such cases made and provided, and that they left eight children and one grandchild, the respondents in this case; and that the appellant laid out considerable sums of money in the improvement and cultivation of the bargained premises, and was proceeding to make other improvements when the action of ejectment was commenced. The bill prayed a discovery, and that the respondents might be compelled specifically to perform the agreement made and entered into by Abner Dwelly and Miriam his wife with the appellant, to release to the appellant the premises in the agreement specified, and be restrained from bringing any actions of ejectment against the appellant, or those claiming under him, for the recovery of the bargained premises; and that in the mean time they be restrained from further prosecuting the suit already commenced, and for general relief.

Chancellor Jones allowed the injunction prayed for. The respondents in their answer admitted that, on the 19th April, 1800, Abner Dwelly agreed to release his interest in certain lands designated as the real estate whereof Moses Martin died seised; that a deed was accordingly drawn, embracing all the lands of which Moses Martin died seised, which was signed by the said Abner Dwelly and Miriam his wife, but the said Miriam declared that she would not acknowledge the due execution thereof, as the respondents stated they had always been informed, and believed truly; and, further, that the appellant frequently made application to the said Miriam to acknowledge the execution of the deed in due form of law, which she absolutely refused to do; and frequently and uniformly declared she never would acknowledge said conveyance, and that her children should, after her

death, prosecute her claim, if she did not survive her said husband; which declarations were often repeated by her to the appellant, as the respondents were informed and believed.

The respondents denied that the consideration money of the conveyance was paid to the said Miriam, or went particularly to her use or to the use of her children; that Abner Dwelly was at all times in easy circumstances as to property, and did not require that money for the maintenance of his wife and children. The respondents in their answer also charged misrepresentation and concealment of facts on the part of the appellant, at the time of the obtaining of the deed in relation to the property of Moses Martin, the father of the appellant and of Miriam Dwelly. In October, 1828, Chancellor Walworth dissolved the injunction; from the order dissolving the injunction, the complainant below appealed. The cause was argued in this Court by

J. Crary, for the appellant.

S. Stevens and D. Russell, for the respondents.

The following opinions were delivered: —

By Mr. Justice Sutherland. The general question presented by this case is, whether a deed of a feme covert, not executed and acknowledged according to the provisions of the statute 1 R. L. 369, and therefore void and inoperative at law, is to be considered and treated in a Court of equity as a valid agreement to convey, the specific performance of which will be decreed as against the feme covert or her heirs. By the common law a feme covert could not, by uniting with her husband in any deed or conveyance, for herself or her heirs, of any estate of which she was seised in her own right, or of her right of dower in the real estate of her husband. This disability is supposed to be founded in the principle, that the separate legal existence of the wife is suspended during the marriage, and is strengthened by the consideration that, from the nature of the connection, there is danger that the influence of the husband may be improperly exerted, for the purpose of forcing the wife to part with her rights in his The law therefore considers any such deed or conveyance favor. as the act of the husband only, although the wife may have united in it, and restrains its operation to the husband's interest in the premises, and gives to it the same effect as though he alone had executed the conveyance. The only mode in which a feme covert could at common law convey her real estate was by

uniting with her husband in levying a fine. This is a solemn proceeding of record, in the face of the Court; and the judges are supposed to watch over and protect the rights of the wife, and to ascertain by a private examination that her participation in the act is voluntary and unconstrained. This is the principle upon which the efficacy of a fine is put by most of the authorities. 3 Cruise's Dig. 153; Tit. 35, c. 10; 2 Inst. 515; 1 Vent. 121 a. But whatever may be the foundation of the doctrine, it is now Our statute declares that no estate of a feme fully established. covert residing in this State shall pass by her deed, without a previous acknowledgment, made by her before a proper officer apart from her husband, that she executed such deed freely, without fear or compulsion of her husband. 1 R. L. 369. provision, it will be observed, is an enlargement, and not a restraint, of the common-law powers of a feme covert. It authorizes a less formal mode of conveyance than was known to the common law. It gives to her deed, when duly acknowledged, the same power and effect as a fine; but, if not acknowledged according to the directions of the statute, it declares that no estate shall pass by it. It leaves it as it would have stood at the common law if the statute had never been passed, — absolutely void and inoperative. It was conceded that such must be the consequence at law; but it was contended that a Court of equity would consider it as an agreement to convey, and, if it was shown to have been voluntarily made for a valuable consideration, would compel the wife or her heirs specifically to perform This doctrine appears to me to be unsound in principle, and unsupported by any color of authority. A feme covert, by the principles of the common law, is not only incapable of conveying her real estate by deed, but she cannot, as a general rule, make a valid contract of any description in relation either to real or personal property.. This disability results from the nature of the matrimonial connection. In contemplation of law, the wife is hardly considered as having a separate legal existence. and her husband constitute but one person. She cannot bind either her husband or herself by any contract. She may execute a naked power; and as to her separate estate,—that is, such estate, either real or personal, as is settled on her for her separate use, without any control over it on the part of her husband, -a Court of Chancery for certain purposes will consider her a

feme sole, and her contracts in relation to it may be binding (5 Day, 496; 2 Kent's Com. 137-141; 1 Johns. Ch. 450; 3 id. 77; 17 Johns. 548), but her own lands, or her right of dower in the lands of her husband, are not her separate estate within the meaning of this rule. It certainly will not be contended that the conveyance in this case can have any greater effect than an express covenant on the part of the husband and wife to convey; and I apprehend that an examination of the cases will show that such a covenant, made during coverture, would be absolutely void against the wife and her heirs, both at law and in equity. The greatest extent to which the English Courts have ever gone, is to hold that an action would lie against a wife, after the death of her husband, upon a covenant of warranty contained in a fine executed by her and her husband, though she was a feme covert when it was levied. This was held in the case of Wotton v. Hele, 2 Saund. 178, and 1 Mod. 290. It was also held in some of the earlier cases that, if baron and feme joined in a lease for years by indenture of the wife's land, and she accepted rent after his death, she was liable to the covenants in the lease. Greenwood v. Tyber, Croke, J., 563, 564; 2 Saund. 180, note 9. acceptance of the rent is a confirmation of the lease, and may be considered equivalent to a new execution and delivery, though the wife was at liberty, after her husband's death, to avoid or The doctrine that a wife is bound affirm it if she had chosen. by her covenant of warranty entered into during coverture, is considered by Chancellor Kent (2 Kent's Com. 140) as at war with the established principle of the common law, that she is incapable of binding herself by any contract; and a contrary doctrine has been expressly held both in this State and in Massachusetts. Fowler v. Shearer, 7 Mass. 21; Colcord and another v. Swan and Wife, 7 Mass. 291. In these cases it was observed, that, although the deed of a married woman is ipso facto void by the common law of England, yet by the immemorial usage of Massachusetts it would pass her estate, and she would be estopped by her covenants, though no action would lie against her for a breach But the Supreme Court of this State, in Jackson ex of them. dem. Clowes v. Vanderheyden, 17 Johns. 167, went still farther, and held that a feme covert not only was not liable to an action on the covenants contained in a deed executed and acknowledged according to the statute by her and her husband, but that she

was not estopped by her covenant from setting up any outstanding title to the premises, or any other defence.

C. J. Spencer, in delivering the opinion of the Court, observed that it was a settled principle of the common law that coverture disqualifies a feme covert from entering into a contract or covenant personally binding upon her. She may at common law pass her real property by a fine duly levied; and, under our own statute, she may also, in conjunction with her husband, on due examination before a competent officer, convey her real estate: but such deed cannot operate as an estoppel to her subsequently acquired interest in the same land. There is a class of cases in which, where the husband had expressly covenanted that his wife should join in a fine of her real estate, he has been decreed specifically to perform his covenant, or to suffer imprisonment by way of penalty. Griffin v. Taylor, Toth. 106; Barrington v. Horn, 2 Eq. Cas. Abr. 17, pl. 7; Hall v. Hardy, 8 P. Wms. 187; Morris v. Stephenson, 7 Ves. 474; Withers v. Pinchard, cited in Morris v. Stephenson. In most of those cases, however, it did not appear that the wife had refused to unite in a fine; and the only reason on which the decisions are put, is, that it is to be presumed she was consulted by her husband before he entered into the covenant, and gave her assent to Lord Cowper, however, questioned this doctrine in Outread v. Round, 4 Viner's Abr. 203, pl. 4, cited in 1 Fonbl. 293, note 7, as did the Master of the Rolls in Daniels v. Adams, Amb. 495. Its soundness was also denied by Chief Baron Gilbert, in his Lex Prætoria, 245; and most pointedly by Lord Eldon, in Emery v. Wade, 8 Vesey, 514, and in Martin v. Mitchell, 2 Jac. & Walk. 425. It was conceded by the counsel, and by Sir Thomas PLUMER, the Master of the Rolls, that such was not the law at The same opinion had been previously expressed by the same learned judge in Howell v. George, 1 Madd. Ch. 16. The case of Baker v. Childs, 2 Vern. 61, is the only one which I have been able to find which contains the slightest intimation that a feme will be decreed specifically to execute an agreement made by her during coverture. The whole report of that case is this: "Where a feme covert, by agreement made with her husband, is to surrender or levy a fine, though the husband die before it be done, the Court will, by decree, compel the woman to perform the agreement." No facts or circumstances are stated.

Whether it was an antenuptial agreement between the husband and wife, or an agreement made by them with some third person, it is difficult to discover. It is altogether too loose and bald a case to be entitled to any consideration; and it is said of that case, in 1 Eq. Cas. Abr. 62, pl. 2, that, upon looking into the register's minutes, it appeared that the Court made no decree in it; but it was, by consent, referred to Mr. Sergeant RAWLINSON for his arbitration. It is in no point of view, therefore, an authority. The case of Roupe v. Atkinson, Bunb. 163, cited by the counsel for the appellants, was this: A lease for a term of years was assigned to the trustees before marriage, in trust that they should make leases for the benefit of the husband After marriage, the husband and wife assigned the lease to one Sparke, for a valuable consideration. death of the husband, the widow brought her bill against Sparke, to be relieved against this assignment made during coverture, on the ground that no fine had been levied. It was held that the assignment by the cestuis que trust was in the nature of an appointment, and should bind them in equity as much as if it had been made by the trustees by their direction. It bears no analogy to this case. The anonymous case in Mosely, 248, is equally inapplicable. An estate was purchased in trust for the husband and wife and their heirs, and the husband and wife joined in a mortgage to the vendor, to secure a part of the purchase-money. The mortgagee brought a bill of foreclosure; and the husband and wife put in a joint answer, in which it is to be inferred no objection was taken to the mortgage on account of the coverture of the wife. The husband died pending the suit, and the wife then moved for leave to amend her answer, in order to set up the defence that no fine had been levied. The Lord Chancellor refused the motion, with the single observation, that, though the mortgage was insufficient at law, he should consider the answer that had been put in as equal to a fine.

Penne v. Peacock and Wife, Cas. temp. Talb. 41, was a case of a mortgage given by the husband to the plaintiff upon the lands of his wife, which had been conveyed by her to trustees, with his privity, before the marriage, in trust to pay the rents and profits to her separate use for her life. After the mortgage given, the husband and wife levied a fine of the mortgaged premises, and both declared the uses of the fine to be to the plaintiff,

for securing the principal and interest of the mortgage. The wife insisted in her answer that she had joined in the fine by duress of her husband, and that she had no estate in the premises upon which a fine could operate. The suggestions of duress and fraud were not sustained by the proofs, and it was held as an established doctrine that the operation of a fine is the same upon trust as upon legal estates. That case also is entirely inapplicable to this. The precise question, however, involved in this case has arisen in a sister State, and been very ably discussed both by the counsel and the Court. I allude to the case of Butler & Atwater v. Buckingham, 5 Conn. 492. It was there held that an agreement by a feme covert, with the assent of her husband, for the sale of her real estate, was absolutely void at law, and could not be enforced against her in a Court of equity. The defendant in that case, Mrs. Buckingham, as the widow of her former husband, Joseph Bryan, had a right of dower in a particular lot of land, of which he died seised. She subsequently married Gideon Buckingham, and she and her husband, in January, 1793, agreed to sell all her interest in the premises to the plaintiffs, Butler & Atwater, and joined in a penal bond to them; the condition of which was, that if she should quitclaim her right of dower in the premises to the obligees, then the bond should be void. The petition (which was in the nature of a bill in chancery) stated that the petitioners immediately entered into the possession of said land, and from that time to the date of the petition, a period of more than twenty years, had had peaceable and uninterrupted possession of the same; that they had made valuable improvements thereon, with the knowledge of the defendant and her husband, in full confidence that they would perform their agreement; that Gideon Buckingham, the husband of the defendant, died in 1810; and that she upon regular and repeated application, had refused to quitclaim her right of dower, and had recently commenced an action at law to recover the same from the plaintiffs. The petition prayed for a perpetual injunction, or that the defendant should be decreed to convey her right of dower in the premises. Upon a demurrer to this petition, it was held by the nine judges sitting as a Court of errors, that the petitioners were entitled to no relief.

It was observed by the Court that the whole system of the common law was opposed to the doctrine on which the petition

was founded; that it was a fundamental principle of the common law that the contract of a feme covert is absolutely void, except where she conveys her estate by fine duly acknowledged, or by some matter of record, when she is privately examined in order to ascertain whether such conveyance is voluntary on her part; and it is pertinently said, How absurd then would it be to enforce such a contract to convey, made without such examination! It would be saying that a feme covert cannot directly convey her real estate unless she be privately examined; and yet she can contract to convey without such examination, and such contract will be enforced against her.

By this mode, the established law in relation to a feme covert and her real estate will be completely subverted.

A feme covert, in relation to her separate property, —that is, property settled to her separate use by deed or will, with a power of appointment, and rendered subject to her exclusive control,and also with respect to property which she holds as trustee without any beneficial interest in her own right, is considered as a feme sole; and her contracts in relation to those subjects may be valid, and a Court of equity may interfere to enforce them. As to all other matters, they are absolutely void; and it is no less a moral than a legal absurdity to say that a Court of equity will enforce a void contract: it is a mere nullity; there is nothing to be carried into execution. The deed of a feme covert, not acknowleged according to the statute, forms no consideration for a promise to pay the purchase-money; a note given under such circumstances is a nudum pactum, and void as between the This was expressly adjudged by the Supreme Court of Massachusetts, in Fowler v. Shearer, 7 Mass. 14, and must be so upon every principle applicable to contracts. If an absolute sale consummated by a deed is void unless such deed is acknowledged in the mode prescribed by the statute, it is impossible that a contract to sell and convey, at some future time, should be The language of the Master of the Rolls, Sir Thomas valid. Plumer, in Martin v. Mitchell, 2 Jac. & Walk. 424, upon the general principle applicable to the contracts of married women, is very strong and explicit. He says: "The acts of a married woman with respect to her estate are perfectly void. She has no disposing power, though she may have a disposing mind. agreement signed by her with her husband cannot affect her estate, and cannot give the party a right to call upon her in a Court of equity to execute a conveyance, to bar her if she survives, and to bind her inheritance. If an agreement is signed by a person competent to contract, and is for a valuable consideration, but defective in form, there is a remedy in equity; for you have a valid contract to stand upon. But with a married woman there can be no binding contract. The instrument is not good as an agreement; then how can it be said to bind her?"

The same language substantially is used by the Court in the case of Wright v. Buller, 2 Ves. Jr. 676, and is to be found in all the elementary treatises upon the subject. The cases of Jackson v. Stevens, 16 Johns. 114; Jackson v. Cairns, 20 id. 303; and Doe ex dem. Depeyster v. Howland, 8 Cowen, 277, show very conclusively the opinion which has always been entertained in our Courts of the absolute nullity of a conveyance or contract made by a married woman in relation to her real estate. In the first case Judge Spencer observed, that the conveyance, although signed and sealed by the wife, was not her deed until she had acknowledged it according to the statute. It could not bind her as a contract. She was not confirming an inchoate and imperfect agreement. The deed took its efficacy from the period of her acknowledgment. There was nothing prior, to which it The other cases are equally strong to the same could relate. Vide also 7 Johns. 81. The bill is not framed with a view to the refunding of the purchase-money paid by the appellant for the premises in question. It seeks distinctly a specific execution of the agreement, or a perpetual injunction of any suit Whether the representatives of Abner Dwelly could be at law. compelled to refund, it is not now necessary to consider.

I am in favor of affirming the decree, with costs.

By Mr. Senator Beardsley. It is supposed by the appellant that the payment of the consideration money, and signing the deed by the husband and wife, amount to such an agreement as will be enforced in chancery by a decree for a specific performance. I do not understand that, in the present case, it is pretended there was any agreement to convey, except the agreement evidenced by receiving the money and signing the deed. It is therefore necessary to decide whether any case could be presented of an agreement on the part of the wife for the sale of her land, without an acknowledgment, as prescribed by statute, that

would be enforced in chancery. I am clearly of opinion that the decision of the Chancellor is right. At common law the wife could part with her interest in lands, only by joining with her husband in a fine, and it then required a private examination before a judge of the Court where the fine was levied. Under our statute she may join with her husband in a conveyance, and thus pass her estate, provided she is examined privately and acknowledges that she does it voluntarily and without fear or compulsion of her husband. The object of the statute is to protect the rights of the wife; and, generally speaking, any agreement or conveyance which she makes in regard to land, except as prescribed by the statute, is not binding upon her or her heirs, because the law adjudges it made at the instance and under the influence and coercion of the husband.

It appears to me that to sustain this appeal will have the effect of unsettling the whole law in relation to the rights of married women in real estate, and will amount to a virtual repeal of the The wife is deemed to be wholly under the influence of statute. her husband, and it is as necessary for her protection that she should be privately examined before an officer, to ascertain her volition in regard to an agreement, as it is in regard to a conveyance. I very much doubt whether any agreement could be made with a married woman, in relation to lands, that could be enforced in equity against her. If any agreement could be enforced, it would probably be one where the consideration money was secured for her separate use, and where it should appear not to have been contrary to her interest. It is not pretended that the present conveyance is of any effect, except as evidence of an agreement that a Court of equity will enforce, and in this respect it is nugatory, because the law adjudges it to have been made at the instance of the husband. If chancery will enforce such an agreement, I can imagine no barrier that can be erected against the encroachment of the husband, or for the protection It fritters away the statute, and makes it a dead of the wife. Suppose a worthless husband, who keeps his wife in constant fear, should wish to dispose of her estate contrary to her wishes; he finds a purchaser, and has witnesses ready, and in the presence of the wife agrees with the purchaser to sell him the estate of the wife, and that she shall join in the conveyance; he receives part of the purchase-money, or the whole, in the

presence of the wife, and puts the purchaser in possession of the property; the wife, from fear of her husband, says nothing (and from silence the law in ordinary cases adjudges acquiescence); the husband has a right to control the possession, and such an agreement unquestionably would be enforced against him; and why not against the wife, if she is capable of making a contract? The whole policy of the law is against this doctrine. Chancellor Kent says: "Though a wife may convey her estate by deed, she will not be bound by a covenant or agreement to levy a fine or convey her estate." 2 Kent's Com. 141. The agreement by a feme covert, with the assent of her husband, for a sale of her real estate, is absolutely void at law, and the Courts of equity never enforce such a contract against her. 5 Day, 492. decided in England, in Wotton v. Hele, 2 Saund. 178, that where the wife joined with the husband in a fine to grant her land with covenant of warranty, that after the husband's death an action of covenant would lie against the wife, on the eviction of the grantee, and this case was relied upon by the appellant in this cause. The authority of Wotton v. Hele has been called in question by Courts in this country as inapplicable to our laws, and has been overturned in Massachusetts, 7 Mass. 21, 291. And in our Supreme Court, in Jackson v. Vanderheyden, 17 Johns. 167, it is decided that the wife could not bind herself personally by a covenant in her deed. On the whole, I do not feel at liberty to depart from the provisions of the statute; they are wise and salutary, and intended for the protection of the wife against the cupidity and improper influence of the husband. He that wishes to divest a married woman of her land, must take care that the statute is complied with before he parts with his money.

The Chancellor's decree must be affirmed. Whereupon the order of the Chancellor dissolving the injunction was unanimously affirmed, with costs, to be paid by the appellant. Leave however was given to the appellant to amend his bill.

JACKSON v. VANDERHEYDEN.

(17 Johns. 167. Supreme Court of New York, 1819.)

Covenant of Warranty of Feme Covert. - Estoppel. - Dower. - Evidence.

This was an action of ejectment, tried at the Rensselaer circuit in July, 1818, before Mr. Justice Van Ness. The plaintiff gave in evidence a deed from Jacob J. Vanderheyden, and Catherine, his wife, the defendant, duly acknowledged, by which they granted and conveyed to the lessor of the plaintiff the premises in question, in fee, with warranty. A witness testified that the premises were part of an estate held and possessed by the father of Jacob J. Vanderheyden, under whom he derived title by devise or descent, and that he was in possession of the premises at the date of the deed; and that the said Jacob died before the commencement of this suit. By an agreement, dated the 10th of April, 1816, between the defendant and John D. Dickenson and others, the defendant covenanted as soon as convenient, and when requested, to release to them all right and title of dower as the wife of Jacob J. Vanderheyden, in certain lands claimed by them, and give up all deeds, &c. And they covenanted, on receiving such release, to convey to her, in fee, lot No. 242, part of the premises in question; and to remove and put a barn standing on the adjoining lot, on lot 242, &c.

A witness proved that the defendant went into possession of the premises by virtue of this agreement. The defendant then offered to prove a title in John D. Dickenson and others, by virtue of a judgment and execution in favor of John Kimberly, against the said Jacob J. Vanderheyden, docketed the 5th of September, 1810, for \$2,000. This evidence was objected to on the ground that the defendant was estopped by her deed, and the covenants in the deed, from setting up anything in opposition thereto. But the objection was overruled by the judge; and the judgment and execution, and a sheriff's deed, dated the 12th of March, 1813, to John D. Richardson, for the premises in question, and the articles of agreement, were read in evidence. The plaintiff then offered to prove that the execution was withdrawn

from the sheriff, and the levy abandoned, after the levy was made, and after the return of the execution, at the instance of Dickenson; and that Dickenson was, in fact, the owner of the judgment at the time the execution was so withdrawn, and the levy thereon abandoned, and at the time of the sale under it. But this evidence was rejected by the judge, who charged the jury to find for the defendant, observing that the covenants in the deed did not bind her; that, as the plaintiff had not deduced and proved title in her, at the time of executing the deed, it could pass an inchoate right of dower, consummated by her husband's death, which was interest not recoverable in ejectment, and that the deed could not estop the defendant from setting up an outstanding title, or any other defence; and the jury, accordingly, found a verdict for the defendant. On a case containing the facts above stated, a motion was made for a new trial, which was submitted to the Court without argument.

Spencer, C. J., delivered the opinion of the Court. The defendant was not estopped by the deed she executed with her husband to the lessor of the plaintiff, for the premises in question. It is a settled principle of the common law, that coverture disqualifies a feme from entering into a contract or covenant personally binding upon her. She may, at common law, pass her real property, by a fine duly levied; and under our statute she may, also, in conjunction with her husband, and on due examination before a competent officer, convey her real estate, or any existing or contingent future interest in it. But such deed cannot operate as an estoppel to her subsequently acquired interest in the same lands.

The defendant's subsequent agreement with Dickenson in regard to the lots in question was not affected by the covenants in the deed to the lessee. The offer on the part of the plaintiff to show that the writ of *fieri facias*, issued under the judgment, in favor of Kimberly against Vanderheyden, had been withdrawn, and the levy abandoned, was properly overruled. It was an attempt, collaterally, to contradict the sheriff's deed; and this we have held (Jackson v. Cray, 12 Johns. 429) to be inadmissible. The plaintiff's remedy, if the facts would authorize it, would be an application to the Court to set aside the sale. I do not understand that the plaintiff relies on the right of dower acquired under the deed from the defendant and her husband. If,

however, that right is insisted on, the answer is decisive that it is a right resting in action only: it cannot be so aliened as to enable the grantee to bring an action in his own name; a feme covert, or a widow, may release her claims of dower so as to bar her, but she can invest no other person with the right to maintain an action for it; and, besides, dower cannot be recovered in an action of ejectment until it has been assigned.

Motion for a new trial denied.

WHITAKER v. WHITAKER.

(1 Dev. 310. Supreme Court of North Carolina, 1827.)

Choses in Possession in the hands of a Bailee.

DETINUE for a negro, and, on the trial, the jury found specially the following facts: The slave in question was the property of Elizabeth Whitaker, and was by her hired out for the year 1825, she being of full age and unmarried. During the term, Elizabeth intermarried with the defendant's testator, who died before its expiration. At the end of the year 1825, the slave came into the possession of the widow, the former owner, who agreed with the defendant to pay hire for it, if in law it belonged to him. Elizabeth, the widow, was in possession of the slave under this agreement, until she intermarried with the plaintiff's intestate, who continued it until his death, when the defendant took the slave into his possession, claiming as executor of Taylor.

Upon this verdict, his honor, Judge Daniel, gave judgment for the plaintiff; and the defendant appealed.

No counsel appeared for either party in this Court.

Henderson, J. The case depends upon the effect which a contract of hiring has upon the possession. If it divests the owner of the possession, and places it in the person hiring, the thing hired ceases to be a chose in possession, and becomes a chose in action, and therefore does not pass absolutely, but sub modo only, from the wife to the husband, upon their intermarriage. A contract of hiring is not a sale of the thing for the period of

hiring; the property remains as it did before; it is a contract for the use of the thing hired. The hirer is a mere bailee, or locum tenens, for the owner, and only holds the property for him. The general property draws to it the possession, as long as the occupant, or qualified owner, retains the occupancy. At any rate, the possession of the hirer is not a possession for himself; for nothing is more common than the maxim, that the possession of the bailee is that of the bailor, and hiring is a species of bailment. If the hirer possessed for himself, he could not possess for another, whose possession has continuance, and is exclusive of his. He is called the qualified owner, not to express his ownership, or that he has any part of the property, but for want of a proper term to express his interest in it. I therefore think the owner's possession is not disturbed by the hiring; that the occupancy of the hirer is perfectly consistent with it, and there fore does not divest it; that the owner has such a possession that he may either sell or give the property. Of course, in the present case, the marriage was a complete gift of the slave in question, to the first husband. For an inability to give, sell, or transfer is the reason why the marriage is not a perfect gift of the wife's choses in action to the husband, they being incapable of a complete transfer, — not for the reason generally given, that it is selling a right of going to law, and thereby stirring up lawsuits, but because such things are not property, and property only is the subject of transfer.

Per Curiam. Judgment reversed, and judgment for the defendant.

The case of Magre v. Toland, 8 Port. 36, is of sufficient importance to be given in full:—

Error to the Circuit Court of Greene.

Detinue for a slave. To the declaration defendant plead non detinet, and the jury found a special verdict as follows:—

That on the 1st of January, 1835, the slave was, and for a long time previously had been, the property of Jane Carnathan, then a minor and unmarried, and was in possession of her guardian, George Hays. That on the said 1st of January, 1835, the slave was hired by the guardian to defendant, John T. Magee, for the term of one year, and was delivered to defendant. That on the 11th of June, 1835, Jane Carnathan intermarried with James Toland, the plaintiff. That on the 26th of August, 1835, said Jane died without issue, leaving the plaintiff, and the following brothers and sisters, to

wit, George Carnathan, Margaret Stewart, and Mary Magee, wife of defendant, John T. Magee, surviving. That from the 1st of January, 1835, as aforesaid, said John T. Magee held possession of the slave, by virtue of the hiring aforesaid, and did not assert or claim any other right, title, or interest in the slave, adverge to the right of said Jane and the plaintiff to the slave. That from the 1st of January, 1835, until the death of said Jane, on the 26th of August, 1835, neither the said Jane nor the plaintiff, James Toland, ever had the actual possession of the slave. That from the said 1st of January, 1835, until the present time, the slave had been, and remained, and was at the present time in the possession of the defendant. That the defendant had never been appointed administrator of said Jane. That on the lat of October, 1836, plaintiff demanded the slave of defendant, who refused to deliver him to plaintiff; and that the value of the slave was \$500. But because the jury were not advised whether, under the facts, the plaintiff was, by law, entitled to the slave; if the Court should be of opinion that the plaintiff was entitled to the slave, then the jury found for the plaintiff; secus, for the defendant. The Court being of opinion, under the facts, that the plaintiff was entitled to the slave, judgment was rendered accordingly; and to reverse this judgment the writ of error was sued out, and the rendition of judgment assigned as error.

Erwin, for the plaintiff in error.

Jones, contra.

GOLDTHWAITE, J. It is obvious that the special verdict presents the question, whether the possession of the slave in controversy by the bailee of the guardian of the wife, at the same time when the marriage was contracted, was such a possession by the wife as to transfer the property to the husband by the mere act of marriage? The solution of this question involves an inquiry into the rights of property acquired by a husband, which attach to him immediately, and in consequence of the marriage. The plaintiff in error concedes the general rule to be, that the husband, in virtue of the marriage, acquires an immediate property in the choses in possession of the wife; but he denies that any other than an actual possession can authorize the application of the admitted rule. This is certainly an ingenious distinction, and deserves well to be examined, as its adoption must have the effect materially to abridge the rights of the husband as generally understood. Personal property is divided into things in possession or in action; and property in possession is again divided into two sorts, — an absolute and a qualified property. The first of these subdivisions is the one which the plaintiff in error denominates as an actual possession, it being where a man has solely and exclusively the right, and also the occupation of any movable chattel, so that it cannot be transferred from him or cease to be his without his own act or default. A qualified, limited, or special property may arise either from the nature of the thing owned, or from the peculiar circumstances and situation of its owner. Many things may be owned which are incapable of actual occupation and absolute dominion at all times, such as wild beasts or birds, but partially reclaimed and not domesticated.

But the more important distinction of a qualified, limited, or special prop-

erty grows out of the peculiar circumstances of the owner, when the thing itself is very capable of absolute ownership. Such is the case of a bailment, or delivery of goods to another, for a particular use or purpose: there is no absolute property in either the bailor or the bailee; for the bailor has only the right, and not the immediate possession; the bailee has the possession, and only a temporary right. But it is a qualified property in them both, and each of them is entitled to an action, in case the goods be damaged or taken away; the bailee, on account of his immediate possession, and the bailor, because the possession of the bailee is immediately his possession also. Such are the views of Blackstone in relation to personal property in possession. His definition of a chose in action, considered as property, is equally satisfactory and precise; it is where a man has not the occupation, but merely a bare right to occupy the thing in question, the possession whereof, may, however, be recovered by a suit or action at law; from whence the thing so recoverable is a thing or chose in action.

He considers that all property in action depends upon contracts, either express or implied, which he asserts to be the only regular means of acquiring a chose in action. 2 Black. Com. 388-396. It will be remembered that this learned author is treating of the nature of property in things personal, and therefore does not enter into any discussion of the distinctions between rights of action for injuries done. He is only speaking of choses in action as property; and in this view no objection can be taken to the definition given, as we cannot conceive that one can have a property in a wrong done or injury suffered. In its more enlarged sense, a chose in actions, may be considered as any right to damages, whether arising from the commission of a tort, the omission of a duty, or the breach of a contract. And in this sense it is considered by most other elementary writers. Bro. title "Chose in Action," Lilly's Abr. 264. It will be unnecessary to ascertain with exactness and precision the nature of a chose in action, or a right of action, if the slave in dispute is within the definition of property in possession, as given by the most approved elementary author, and fully supported by the authorities which he cites.

It appears that the slave was owned by the wife previous to and at the time of the marriage; and was in the possession of the defendant as a bailee for hire, holding under the guardian of the wife. The authority already referred to expressly states that the possession of the bailee is also that of the bailor; and it only remains to show that the possession of the guardian is also the possession of the ward. Independent of the manifest reason that such a rule should obtain, we find no direct decision on the precise point in relation to personal property; but the authorities are numerous and concurrent that the possession of lands by the guardian in socage is the possession of his ward, and that no entry is required to be made by him. Coke on Litt. 15 a; Newman v. Newman, 3 Wils. 516; Doe v. Keene, 7 T. R. 386. No reason is conceived by the Court why the possession of the guardian should not be held as the possession of the ward, in relation to all personal chattels capable of possession, as it is clearly a title derived under the ward, and held solely and exclusively for his benefit. The guardian has an interest in the thing possessed, without which he would not be able to sustain an action; but such

interest is consistent with, and ancillary to, the property of the ward; it never has been supposed otherwise.

As the possession of the defendant below was the possession of the wife at the time when the marriage was contracted, it results that the property in the slave in question was transferred to the husband at the instant of marriage; and it was then as much in his possession in point of law as it could afterwards have been by an actual manucaption.

It is, however, contended that whatever may be the rule of the common law on this subject, this case must be governed by a previous decision of this Court, which is said to decide the identical question here presented. The case referred to is Johnson v. Wren, 3 Stew. 172. Without undertaking to pronounce what weight that case ought to have on one presenting a similar state of facts, we content ourselves with observing, that there the question of possession was left to the jury on the evidence, and was not before this Court on any exception to the charge of the Circuit Court. It is true that the Court seemed to consider the estate in the slaves as one in action and not in possession; but, as the point did not arise in this Court, we do not feel inclined to consider it as closing the investigation in this case. Another distinction between that and this case is to be found in the fact, that there the wife and here the husband is the survivor. Neither does this case resemble, in any respect, that of Mayfield v. Clifton, 3 Stew. 375, which was decided on the conflicting claims of a husband and the children of his deceased wife to her undivided, distributive share of the estate of her former husband.

We will now ascertain how far the principle we have recognized as applicable to this case has the sanction of adjudicated cases in this country in its support, remarking that there is a total absence of cases on this subject in the English reports. In the case of The Ordinary v. Geiger & Wife, reported from the MS. reports of Judge Brevard, in 2 Nott & McCord, 151, the facts were as follows: The mother of Geiger's wife, while sole, made and executed a deed of gift of certain negroes to her four children jointly. Afterwards, one of these children married Geiger, the intestate. On the marriage, one of the negroes given as aforesaid was sent with her on her going to live apart from her mother, and remained with her ever since. No regular partition was ever made of the property between the donees. After the death of Geiger, his widow intermarried with the other defendant, and they jointly administered on his estate, and in the inventory returned to the ordinary made no mention of the negroes given as aforesaid. The question was whether this omission was a breach of the condition of the administration bond. The Court were all clear that a right of possession vested instantly on the execution of the deed of gift, and that the female defendant was entitled, as a joint lineal, to the property given; and therefore that, on her intermarriage with Geiger, the property and right of possession which she had, vested in him and became a part of his personal estate, and ought to have been returned as such in the inventory.

In Davis v. Rhame, 1 McCord, Ch. 195, the slaves had been allotted by partition to Miss Davis (afterwards Mrs. Clark). She was then a minor, and her slaves went into the possession of Rhame, her guardian, who dying, his

executor took possession of them. After the death of Mrs. Clark, her husband obtained possession of them. The Court decided that the possession of the guardian was the possession of the ward, and consequently her husband's.

The same principle was recognized and confirmed in Saussey v. Gardiner, 1 Hill, 191.

In North Carolina the same principle has been acted on in the case of Armstrong v. Simonton's Adm'r, 2 Taylor, 266; s. c. 2 Murphy, 351. The slave sued for was owned by the plaintiff, whose daughter intermarried with Simonton, and to whom, residing in Georgia, she loaned or gave a slave. After the loan or gift to Simonton, the plaintiff intermarried with Abel Armstrong, who died before Simonton, and before this suit was commenced. The judge who tried the cause instructed the jury, that if the transaction was a loan determinable at the will of the lender, and there was no adverse possession set up, the property vested absolutely in Abel Armstrong on his intermarriage with the plaintiff, and that his executors could alone recover it. This opinion was pronounced correct by the Supreme Court.

In Kentucky, in Bank's Adm'rs v. Marksberry, 3 Litt. 275, the facts were as follows: In 1773 Samuel Marksberry executed a deed, by which he gave a female slave to his daughter Rachel, but, by the the terms of the deed, was to retain possession during his life. Rachel intermarried with William Banks, in 1790; and after having several children by him, of whom the plaintiff was one, died in 1798. Her father, Samuel Marksberry, the donor, died some years afterwards. The plaintiff, in 1821, took administration on the estate of Rachel Banks, his mother, and instituted the suit to recover the slaves descended from the one given to her. It was ruled that the slaves were not choses in action: and that the interest of Rachel vested in her husband, although she never had the possession, and died before she was entitled to it by the terms of the gift.

The language used by the Court is peculiarly appropriate, and may be quoted to illustrate this case: "The slaves were in the possession of the donor, but his possession was consistent with the title of Mrs. Banks, and not adverse. There is no proof that he ever did, prior to her marriage, set up any claim to the slaves, incompatible with the deed of the gift; and under that he had only a right to the use of them for life, while the absolute property in fee belonged to Mrs. Banks. She had, in fact, the general, and he only a special, property in the slaves; and it is a known rule of law, that the general property of a chattel draws to it the possession. She was not, indeed, in the actual enjoyment of the slaves; but surely every chattel of which the owner is not in the actual enjoyment, cannot be denominated a chose in action. Nor is such actual enjoyment of a chattel which accrues to the wife before marriage necessary to vest her interest in the husband If a chattel be found and not converted to the use of the finder, if it be hired or loaned, or otherwise bailed, it does not thereby become a chose in action; and if it belongs to a woman who marries, her right immediately vests in the husband, at least so far that, if she dies, it will survive him."

Similar decisions have obtained in Virginia, from the earliest establishment

of Courts. See Dade v. Alexander, 1 Wash. 39, cited with other cases with approbation in Wallace v. Taliaferro, 2 Call, 470. See also, in connection with the subject-matter, Doe v. Polgrean, 1 Hen. Black. 535; Coke, Litt. 351 a; 3 T. R. 631; Crozier v. Bryant, 4 Bibb, 174; Pinkard v. Smith, Littell's Selected Cases, 331. Such a concurrence of authority, in so many of the States, holding the peculiar description of property which is oftener the cause of a qualified or special estate than any other description of personal chattels, requires the strongest reasons to be shown for a departure from the general rule. None such have been, or in our opinion can be, shown.

The judgment of the Circuit Court is affirmed.

BUCKLEY v. COLLIER.

(1 Salk. 114; s. c. 4 Mod. 156; Carth. 251; 3 Salk. 63. Court of King's Bench, 1692.)

Wife's Earnings. — Action therefor, &c.

BARON and feme declared that the defendant, being indebted to them for work done by the wife in making him a peruke, he promised to pay, and had not paid ad dam. ipsorum, &c. To this there was a frivolous plea, and upon that a demurrer.

The plaintiff cited 3 Cro. 205; 3 Cro. 61, 96; 1 Cro. 488. But relied principally upon Burchet's case.

Per Curiam. Burchet's case differs: There was an express promise to the wife, and to that the husband assented by bringing an action thereupon; but here is no express promise laid to the wife; here is nothing but the promise in law, and that must be to the husband, who must have the fruits of his wife's labor, for which he must bring a quantum meruit. Also the advantage of the wife's work shall not survive to the wife, but goes to the executors of the husband; for if the wife dies, her debts fall upon the husband; and therefore so shall the profits of her trade to the husband's executors. But this must be intended of work done during the coverture, and not after.

Judgment pro defendant.

¹ See Heard v. Stamford, in note to Whitaker v. Whitaker, 6 Johns. 112.

SKILLMAN v. SKILLMAN.

(15 N. J. Eq. 478, affirming, s. c. 13 N. J. Eq. 403. Court of Errors and Appeals of New Jersey, 1863.)

The Earnings of a Feme Covert.

This was an appeal from the decree of the Chancellor in the case reported in 2 Beasley, p. 403.

Leupp, for appellant.

Speer, for respondent.

The opinion of the Court was delivered by

HAINES, J. The complainant, by her bill, claims to have an equitable interest in a certain house and lot of land, the legal title to which was in her husband at the time of his death; and she seeks to have it protected against a judgment obtained by the defendant, John G. Skillman, against her husband, in his lifetime, on a bond and warrant of attorney to confess judgment, upon the ground that the judgment was without consideration and fraudulent and void. The equity of the bill rests in allegation of a right and interest of the complainant in the house and lot, and in the fraudulent intent of the defendant, John G. Skillman, in procuring the judgment. The charge of fraud is fully denied by the answer in response to the bill; so that, if the complainant has any interest in the property, and was in a situation to question the validity of the judgment, on this explicit denial of the fraud charged, the injunction might have been properly dissolved. But the case made does not show such an interest in the property as would entitle her to protection against the judgment, even if it were fraudulent. Her claim is not based on a right of dower; and, if it had been, it would have needed no protection in this form, as the judgment against her husband could not affect her dower.

But she claims by a right in equity paramount to the legal title of her husband. She insists that, having negotiated for the purchase of a lot of ground and for the building of the house, and paid a considerable portion of the purchase-money, a trust results to her. On examining the allegations of the bill, it

appears that she, with the knowledge of her husband, negotiated for the purchase of the lot, and that it was conveyed to him, and he paid the purchase-money; that afterwards a contract was made for the erection of a small house on the lot, at the cost of six hundred and seventy-five dollars, of which sum five hundred dollars were secured by his bond and his and her mortgage on the property, and the residue, one hundred and seventy-five dollars, paid to the contractor. It is not alleged to have been paid by her, and the presumption is that it was paid by her husband. Thus far the whole consideration-money on the purchase of the lot and the cost of the building were paid and secured by the husband. After this, and until May, 1854, she paid the yearly interest on the bond and mortgage, and one hundred dollars of the principal. She afterwards contributed to the monthly payments on two shares of Mechanics' Building and Loan Association purchased by him, until he became entitled to a loan of four hundred dollars, which was taken and secured by a mortgage on the house and lot, and with that money the residue of the sum secured by the original mortgage was paid. She afterwards contributed to the monthly payments due by way of interest on the loan, until the value of the two shares were so enhanced as to be nearly sufficient to pay off the last mortgage; all of which payments so made by her were almost entirely from her own earnings, her husband contributing but little towards it.

Admitting the entire truth of all these allegations, they fail to establish a resulting trust, or to show any interest in the property paramount to the title of her husband. By the common law, the earnings of the wife, the product of her skill and labor, belong to the husband. They do not become the property of the wife, even in equity, without a clear, express, irrevocable gift, or some distinct affirmative act of the husband divesting himself of them, or setting them apart for her separate use. There is no allegation of any such act here. She was permitted to apply the product of her labor, not to her own use, but to the payment of her husband's debts. Her object was truly praiseworthy, and her efforts provident. She meant to secure a home for herself and her family; and it may be regretted that they had not taken proper measures to accomplish that purpose.

As the business was transacted, the title to the house and lot was in her husband, and the purchase-money and the cost of

building paid by him, and out of money belonging to him. The legal and equitable title vested in him. There was nothing done or suffered to divest him of such title, even as between him and his wife, much less as between him and his creditors. The bill was properly dismissed, and the decree of the Chancellor must be affirmed, but, under the peculiar circumstances of the case, without costs.

The decree of the Chancellor was affirmed by the following vote:—

For affirmance,—Judges Brown, Combs, Cornelison, Elmer, Haines, Kennedy, Ogden, Fort, Swain, Vredenburgh, Whelp-ley—11.

For reversal, - None.

SCHUYLER v. HOYLE.

(5 Johns. Ch. 196. Court of Chancery of New York, 1821.)

What amounts to a Reduction to Possession of the Wife's Distributive Share so as to bar her Survivorship. Wife to be made a Party to the Suit therefor.

THE bill stated that Henry Ten Eyck Schuyler died seised of a large real and personal estate, intestate, on the 25th of September, 1812, leaving Sally S., a widow, mother of the plaintiffs, and the plaintiffs and J. B. S., his only children; and that J. B. S. died an infant, on the 16th of January, 1817. That, on the death of the intestate, the widow, as natural guardian to the plaintiffs, took possession of the real estate, and from the death of the intestate until her marriage with the defendant, Henry Hoyle, received the rents and profits. That she possessed herself of the personal estate, and sold a large part thereof; that, since her marriage with H., on the 30th of January, 1817, the defendant H., her husband, had received the rents and profits of the real estate, and possessed himself of the personal estate which remained in her hands, to the amount of \$50,000. the defendants had possessed themselves of all the deeds and muniments of the estate, and had refused to account, &c. Prayer, that the defendants be decreed to account with the

plaintiffs touching the real and personal estate of the intestate, and for general relief, &c. The material facts appearing in the answer, and from the proofs taken before the master, in regard to the question argued and decided, are, that Mrs. S., widow of the intestate, now Mrs. Hoyle, was one of the heirs-at-law of Gerrit Fisher, who died intestate, in England, prior to June, 1811, leaving a large personal estate, of which she, as one of the heirs and next of kin, was entitled to one twelfth, as her distributive share. She succeeded to that share while she was the wife of H. T. E. Schuyler; and on the 19th of June, 1811, the legal representatives of Gerrit F. entered into an agreement, by deed, with N. J. Visscher, to which instrument S. was a party, and which also purported to be made by his wife as a party, but was not in fact executed by her. This agreement recited that a letter of attorney had been executed by the said parties to that deed (being the legal representatives of G. F.), and, of course, by "Henry Ten Eyck Schuyler and S., his wife," to N. J. V., authorizing him to proceed to London, and there sue out letters of administration, and collect the property of G. F., deceased, and pay his debts; and, after deducting reasonable expenses, and a reasonable sum stipulated for his own compensation, to pay over "to the said parties of the second part, respectively," which, of course, included S. and his wife,—their respective distributive shares. The agreement then provided that N. J. V. should proceed forthwith to England, and there, in the mode he should deem best, should execute the power; and, after paying the debts, and deducting expenses and a reasonable sum to cover allowances for his services, to remit the residue of the property of G. F., the intestate, to Thomas Eddy of New York, to be by him deposited in the Bank of New York in the name of N. J. V., and to be by him distributed as before mentioned. The rest of the agreement related to the compensation to be allowed to N. J. V. Under this authority, N. J. V. went to England, where he arrived in August, 1811, and took out letters of administration on the estate of G. F., in England; and, on the 12th of October, 1811, he took out letters of administration on the intestate's estate in Ireland, and collected and converted most of the assets into American stocks and British goods, within one year after he arrived in England. He remitted the stocks to Barent Bleecker of Albany, and the goods to Peter Remsen of

New York, who sold the goods, and paid the proceeds to N. J. V., with whom, in character of administrator, P. R. accounted, and to whom, as his principal, he paid the proceeds. H. T. E. Schuyler died the 25th of September, 1812, subsequent to which time P. R. paid the proceeds of the goods, amounting to \$400,000, to N. J. V., who afterwards paid the amount over to B. Bleecker, to be distributed among the heirs of G. F. stocks remitted by N. J. V. to Bleecker came into his hands before the death of S. The amount received by B. prior to the death of S. was \$123,078.58, and the amount received by him after the death of S. was about \$400,000. The amount of the distributive share of Mrs. S. was \$48,342.98 including \$1,950, being the value of certain lands belonging to the estate, not sold before the death of S. Of this distributive share, B. paid to S., in his lifetime, \$11,815.29, and the residue to his widow (now Mrs. H.) after his death. So that S. received, during his life, above \$1,500 more than his wife's distributive share of that portion of the estate of G. F. which came to the hands of B. in the lifetime In the receipt of the moneys, and in the transaction of the business, B. acted under letters of attorney, dated January 6, 1812, from the legal representatives of G. F., and which was executed by S. "in behalf of his wife, Sarah Ten Eyck Schuyler." This power authorized B., as their attorney, to demand, sue for, collect, and receive all debts and moneys due G. F. at the time of his death, and to take security in their names, if requisite, to liquidate debts and demands, and to pay debts due from the estate of G. F., or from them as heirs, and to sue out letters of administration on the estate of G. F., if necessary, and to sell at auction such parts of the estate as he should deem best, and, after deducting expenses and allowances, to distribute the estate as follows: "amongst us, our heirs, executors, administrators, or assigns, according to our respective rights in and to the real and personal estate of G. F."

Buel, for the plaintiffs, contended,—1. That, upon the death of Gerrit Fisher, the distributive share of the wife of H. T. E. Schuyler in his estate, became absolutely vested in her husband. Such distributive share becomes vested from the time of the death of the intestate (except in the case of a posthumous child); so that if the person entitled to it die within a year after the intestate, and before the estate is actually divided, the share

goes to the next of kin of the deceased. Toller's Law of Executors, 386; 1 Madd. Ch. 517; 3 Bac. Abr. 75, tit. "Executors," &c. In Browne v. Shore & Wife, 1 Shower, 25, J. S. died intestate, and A. and B., who were his next of kin, died within a year after, and before distribution of the intestate's estate. C. J., and the rest of the Court, held, that A. had a vested interest, which went to his executors. In Cary v. Taylor, 2 Vern. 302, A. married B., the daughter of J. S., who died intestate. B. died before the distribution of her father's estate. died before distribution or administration. The plaintiff was administrator to A., the husband, and the defendant was the administrator of B., the wife; and the question was, which of them had the right to the share of J. S.'s estate remaining undistributed. It was admitted on all hands that the share to which B. was entitled was a vested interest, before any distribution was made; but the doubt was whether it was so vested, as a legacy assented to, that it would vest in the husband, without his taking administration to his wife. The question does not appear to have been decided in that case; but the doubt raised was not well founded. Comyns (2 Comyns's Dig. tit. "Baron & Feme," E. 3; 2 Roll. 134) says: "If a legacy be given to a feme covert, to be paid in twelve months after the testator's death, and the wife dies within the twelve months, the interest goes to the husband; for it was vested in him, and he might release it within the twelve months." Robertson v. Taylor, 2 Bro. C. C. 589; 2 P. Wms. 49, n. d.; Grice v. Grice, Edwards v. Freeman, 2 P. Wms. 441. The doubt in Cary v. Taylor seems to have arisen from the circumstance that the husband had not administered on the wife's estate. But it is now well settled that this circumstance is of no moment; for the wife's choses in action go to the representatives of the husband, although he has not administered on her estate, and not to the wife's next of kin. Whitaker v. Whitaker, 6 Johns. 112. It follows, then, that a distributive share is a vested interest from the time of the intestate's death; and it must vest in the husband, not in the wife; for a married woman cannot, during coverture, acquire any property, unless given specially to her separate use and through the medium of trustees. All her acquisitions of personal property during coverture belong to her husband. For this reason, indebitatus assumpsit for work done by the wife will not lie by

the husband and wife, but the husband must sue alone. 2 Comyns's Dig. tit. "Baron & Feme," W.; 1 Salk. 114; 1 Chitty's Pl. 19. A note given to the wife during coverture is part of the husband's assets. Hodges v. Beverly, Bunb. 188. So, if a bond is given to the wife, the husband must sue alone for it. 2 Atk. 208; 2 Mod. 217; 4 T. R. 616; 3 Lev. 403. Where a legacy was given to a feme covert, who lived separate from her husband, and the executor paid it to the wife, and took her receipt, yet, on a bill brought by the husband, the executor was decreed to pay it over again, with interest. 1 Bac. Abr. tit. "Baron & Feme," D.; 1 Vern. 261.

The cases which seem to support a contrary doctrine, or to recognize the right of survivorship in the wife, as to her choses in action, are those in which the wife was entitled to them before marriage, and they had not vested in the husband, or where the husband had elected to sanction the wife's right of survivorship, by joining with her in an action, &c.; or where bonds, notes, &c., have been taken to the husband and wife jointly, and the husband has done no act to alter the property, and thus impliedly assented to her right of survivorship. Comyns's Dig. tit. "Baron & Feme," F. 1, F. 2; 1 Vern. 396; 1 Fonbl. Eq. B. 1, c. 4, § 24, n. (y). Both Comyns and Bacon, as well as others, make the distinction between property or choses in action to which the wife was entitled before marriage, and such as accrue to her during coverture; and they all agree that the husband has an absolute property in all the acquisitions of the wife during coverture, whether by gift, devise, or by her labor. Comyns's Dig. "Baron & Feme, "E. 3; Bac. Abr. "Baron & Feme," D. C. 3; 2 Roll. 134; Comyns, 725. This doctrine is also fully recognized by Judge Reeve in his work on "Domestic Relations," pp. 60, 63. says: "Personal property acquired after marriage by her means belongs absolutely to the husband; so that if a legacy should be given to the wife during coverture, and the husband should die before it is paid or due, it would not belong to the wife, but to the husband's executor." He asserts the same thing in regard to the wife's distributive share; and Toller says that a distributive share is just like a residuary legacy.

2. But if it was necessary that S. should have altered the property in order to vest the title in him, enough has been done by him for that purpose. He, together with the others, executed

a power to V. to collect the property; by virtue of which V. took out administration in England, and collected all the property, before the death of S. So that Bleecker was the attorney in fact of S. and the others in this country, and acted under the Now, it is well settled that if a husband gives a power of attorney to recover his wife's debt, legacy, or other chose in action, and the attorney does receive it, although it does not actually come to the hands of the husband, yet it is absolutely and indefeasibly his property. 1 Bac. Abr. 480, tit. "Baron & Feme," C. 3; Rol. Abr. 342; Moore, 452; Golds. 160; Reeves Dom. Relat. 4; Comyns's Dig. tit. "Baron & Feme," E. 3. A voluntary assignment by the husband of his wife's distributive share makes it the property of the husband, though the assignment, as between him and the assignee, is void. 1 P. Wms. So, an order of the Court of Chancery to pay the wife's legacy to the husband vests it in the husband, though he dies before payment, and defeats the wife's right of survivorship. 3 Bro. C. C. 362. So, a judgment recovered at law by the husband, has the same effect. 1 Fonbl. Eq. B. 1, c. 4, § 24. Though it is otherwise if the husband is joined. The principle on which these cases are founded is, that, where the husband has done any act in relation to his wife's choses in action manifesting his intention to appropriate them to himself, the law deems it such a reduction into his possession as vests him with the property.

- J. Paine, contra, contended,—1. That the husband has only a qualified interest in his wife's choses in action; and unless he reduces them into possession, by action or otherwise, during his life, they belong to the wife, in case she survives him. Toller's L. of Ex. 219, B. 2, c. 5, § 2; 3 Vesey, 469; Co. Litt. 351 b; 9 Vesey, 87. It is true, that, if the husband survives the wife, he alone is entitled to her personal property or choses in action. 6 Johns. 112; 1 N. R. L. 314, § 17; Co. Litt. 351 b.
- 2. What acts, then, were done by S., in his lifetime, to reduce the distributive share of his wife in the estate of G. F. to his possession? The power of attorney to V. was in the name of S. and his wife and the other persons; and V. was to pay over her share, after deducting charges, &c., to S. and his wife. This was the only authority under which V. acted. Though the agreement was not in fact executed by the wife of S., yet she

was made a party; and it recites the power of attorney and that the said parties executed the power. It must be taken as fact, therefore, that S. and his wife executed the power, and V. was to pay over her distributive share to herself and husband jointly. Admitting, then, the rule of law to be (Toller, 221, 222), that if the husband gives a letter of attorney, to receive a debt or legacy due to his wife, and the attorney receives it, but the husband dies before it is paid over to him, it will go to his executors, it does not follow that it will be considered as reduced to the possession of the husband, where the power, as in this case, is given by the husband and wife jointly, and the attorney is to pay over the money to them jointly. The husband may sue alone for the debt or legacy due to his wife; but, if he joins the wife and recovers judgment, it will survive to her. 1 Fonbl. Eq. 314 n; Toller's L. E. 220; 4 Hen. & Munf. (Va.) 452. The reason of the distinction is that, by bringing the action in his own name, he signifies his disagreement to the wife's interest, and his intent that it shall not survive to her; but, where the action and recovery is in their joint names, it shows that his intention is not to alter the property. Wildman v. Wildman, 9 Vesey, 176. In Baker v. Hall, 12 Vesey, 496, where the husband entered into possession of the real and personal estate of the testator, as executor and trustee under the will, and disposed of part, the Master of the Rolls held that the husband must be deemed to have taken possession as executor and trustee only; and that, therefore, his wife's share of the residue of the testator's estate could not be considered as so reduced to the possession of the husband as to prevent its surviving to the wife upon his decease, and, of course, going, upon her death, to her personal representatives. So, in the case of Wall v. Tomlinson, 16 Vesey, 413, the Master of the Rolls held that stock belonging to the wife was not reduced to the possession of the husband by a transfer to him merely as a trustee, for the transfer was made diverso intuitu. If, then, the principles deduced from these authorities be correct, it might be safely admitted that V. had, by virtue of the power from S. and his wife and the others, obtained full possession of all the property in the lifetime of S. But the fact is that the estate of G. F., which consisted principally in Bank of England and British government stocks, was not transferred to him as the agent or attorney of the legal representatives of the intestate, but in his

character of administrator. He could not have obtained the property, except as administrator. Having duly obtained letters of administration on the estate, according to the laws of that country, his character as agent or attorney ceased, or became merged in that of administrator. If the property had been transferred to S. himself, as administrator of the estate of G. F., the possession, according to the cases which have been cited, would not have been such as to prevent, in case of his death, his wife's claim as survivor. A fortiori, then, the possession of V. as administrator would not be sufficient to produce that effect. The claim or interest of S. was only under the statute of distribution for a mere chose in action. 3 Vesey, 469. Again, S. could not, at the time of his death, have enforced that claim, either at law or in equity. V. arrived in England in August, 1811; the date of the letters of administration granted to him in England does not appear. Those in Ireland were dated October 12, 1812. S. died September 26th, 1812. A year, therefore, had not elapsed at the death of S.; and by the Statute of 22 & 23 Charles I., c. 10, no distribution of an intestate's estate can be made until after the expiration of one year from the time of granting administration; and the administrator is allowed a year to render his account and close the estate. Toller, 97.

But, admitting that S. could have enforced his claim for his wife's share, it must have been in a Court of equity, not in a Court of law. 5 T. R. 692; 5 Vesey, 516; Toller's Law of Ex. 479, 489. And she must have been joined in the suit. 1 Madd. Ch. 384; 1 Fonbl. Eq. 318; 3 Vesey, 469; 5 Vesey, 516. And, if he died pending the suit, the right would survive to her; or, if there had been a decree, she would have had the benefit of it. 1 Ch. Cas. 27; 4 Hen. & Munf. (Va.) 452.

The CHANCELLOR. The question submitted in this case is, how far, and to what extent, Henry T. E. Schuyler, deceased, had reduced to possession the distributive share belonging to his wife, of the estate of Gerrit Fisher, deceased, so as to be enabled to transmit the same, as part of his personal estate, to the plaintiffs, his children, and prevent it from surviving to his wife.

After stating the facts of the case, his honor proceeded: The only point in the case arising from these facts is, whether the distributive share of the \$400,000 belonging to Mrs. Schuyler,

and which came from N. J. V., the administrator, to Bleecker, after the death of S., did or did not survive to the wife, as not having been reduced to possession by the husband in his lifetime. I am relieved from the necessity of examining into the effect of the receipts by B., prior to the husband's death, because his wife's share, and more than his wife's share, of those receipts were paid over to the husband. After looking into the authorities which have been referred to by the counsel, and upon a consideration of the doctrine of the cases, there remains no doubt in my mind, that the wife was entitled, as survivor, to all that portion of her distributive share which was not paid over to Bleecker, but remained in the hands of the administrator of F. at the time of her husband's death. There is not even color for the pretension, on the part of the plaintiffs, that the assets of F., the intestate, which were in the hands of his administrator on the death of S., were to be considered as no longer things in action, and held by him as administrator, but as actually reduced to the husband's possession, so as to cut off the right of survivorship in the wife. As I do not know that this question has ever been discussed in this Court, it will be satisfactory to review some of the leading cases. We have no concern, at present, with the doctrine that establishes the husband's right to his wife's choses in action in case he survives her. It appears to be settled that he is, in that event, entitled to them, whether they were or were not reduced to possession by him in her lifetime. Her whole personal estate in action, as well as in possession, vests in the husband upon her death; for his right to administer on her personal estate includes a right to her choses in action. They vest in him by the statute of distributions, as her next of kin. Squib v. Wyn, 1 P. Wms. 378; Cart v. Rees, cited id. 381; Elliot a Collier, 3 Atk. 526; Humphrey v. Buller, 1 Atk. 458; Co. Litt. 351 a, note 304; Whitaker v. Whitaker, 6 Johns. 102.

Nor have we any concern at present with the doctrine, that, if the husband and wife give a letter of attorney to a third person, to receive a legacy due to the wife, as was the case in Huntley v Griffith (Gouldsb. 159; Moore, 452, s. c.), or if he alone gives a letter of attorney, according to the dicta of the judges in that case, a receipt by the attorney changes the property of the legacy, and transfers it to the possession of the husband. That doctrine does not apply; because the attorney, in

the present case, did not receive the property for which the defendants are sought to be accountable until after the husband's death. The present inquiry then is, whether there was any such interference or change of the wife's property by the husband before his death, though it did not come actually into his possession or into that of his attorney, as to take away the right of survivorship in the wife. And for the more full illustration of the point, we will see what acts the husband may do, to affect the wife's property, without reducing it to actual possession.

In the first place, he may assign, for a valuable consideration, his wife's choses in action. This was agreed to in Carteret v. Paschal, 3 P. Wms. 197, and expressly decided in Bates v. Danby, 2 Atk. 206. The wife, in the last case, became entitled during coverture to a distributive share of an intestate's estate; and that share consisted of two mortgages, which the husband took and left with a creditor, under a promise to assign them by way of security, but died before actual assignment. Lord HARD-WICKE held this to be an assignment in equity, pro tanto, so far as the debt to the creditor was concerned, and that though the husband might have disposed of the whole interest, yet, as he did not, the residue of interest in the mortgages belonged to the wife surviving her husband. So, again, in Jewson v. Moulson, 2 Atk. 417, the wife was entitled before marriage as a legatee of her father; and the husband assigned all the interest which he was entitled to in her right to her father's personal estate, to a creditor. But the Chancellor allowed the creditor's claim only on condition of his agreeing to make a separate provision for her and her children.

The doctrine of these cases is, that the husband may assign his wife's choses in action, for a valuable consideration, to a creditor; but even then the assignment is subject to her equity for a reasonable provision. Vide the cases of Pryor v. Hill, 4 Bro. 139; Like v. Beresford, 3 Vesey, 506, s. p. Those cases also show that there is no distinction between the case of an interest vesting in the wife before or after coverture; and the inference from them is (and the position is expressly conceded in other cases, and is well established: Burnet v. Kinnerton, 2 Vern. 40; Lord Thurlow in Saddington v. Kinsman, 1 Bro. 51, note to P. Wms. 381), that a voluntary assignment by the husband of the wife's personal property in action, without considera-

tion, will not bind her, if she survives him. This admission of the right of assignment, for a valuable consideration, so as to pass the right of property free from the wife's contingent right of survivorship (though not from the wife's equity for a reasonable provision for her support), and the denying of this effect to a voluntary assignment, were also expressly declared by the Master of the Rolls in Mitford v. Mitford, 9 Vesey, 87. He there held that an assignment in bankruptcy had no greater effect than a voluntary assignment, and he applied the rule to the case of a legacy given to the wife during coverture.

It is to be observed that we are examining the cases in respect to the question of the wife's right of survivorship, and how far the property has been altered so as to prevent it. We have nothing to do at present with the point, which so often appears in the chancery cases, how far the husband's assignment of the wife's property may affect what is termed the wife's equity to a reasonable provision out of the property for the support of herself and her children. The two questions are not connected, and present very different rules for consideration.

In Gasworth v. Bradley, 2 Vesey, 675, Lord HARDWICKE discussed more fully the control which the husband had over the wife's personal property lying in action. The wife had a legacy left her during coverture, and part of another legacy came to her by intestacy. The husband assigned over the whole interest, with a proviso that, at his request, the assignee should reassign. He died, and the wife survived him, and the question arose between the respective representatives of the husband and of the wife, whether the surplus of her estate arising from the bequest and the intestacy survived. There was a settlement in that case, but the Chancellor decided the question arising on the survivorship of the legacy and distributive share, independent of the settlement, and upon the general doctrine applicable in He observed that, whenever a chose in action came to the wife, whether vesting before or after marriage, it would survive to the wife, if she survived her husband; with this distinction, however, that, as to those things which came during coverture, the husband might bring an action in his own name, and might disagree to the interest of his wife; and a recovery in his name was equivalent to reducing it to possession, and it would go to his representatives; and for which point he cited the case of Hillard v. Hambridge, Aleyn, 36. He said, further, that the husband might have released the money, or have assigned it for a valuable consideration to a creditor or purchaser. But, in that case, as the assignment was not absolute, but with a proviso which created a trust for the benefit of the husband, there was no alteration of the property, as the husband was previously the owner, subject to the wife's survivorship. The portion, therefore, of her estate not got in was held to have survived to the wife.

With respect to a decree, judgment, order, or award in favor of the husband, as to money to which he was entitled in right of his wife, it seems to be a settled rule, that if he sues alone and recovers, the property vests in him by the recovery, and is so changed as to take away the right of survivorship in the wife; but, if the suit was in their joint names, the wife, as a survivor, would take the benefit of the recovery. Oglander v. Baston, 1 Vern. 396; Nanny v. Martin, 1 Ch. Cas. 27; Heygate v. Annesley, 3 Bro. 362; 1 Fonb. 305, 306, 308. It appears, then, by the cases which we have hitherto noticed, that if the husband appoints an attorney to receive the money, and he receives it, or if he mortgages the property, or assigns it without reservation and for a valuable consideration, or if he recovers it by a suit in his own name, or if he releases the debt,—in all these cases, the right of survivorship in the wife ceases. But with respect to suits in this Court by the husband, for the wife's legacy or distributive share, I apprehend the rule to be that the wife must be made a party. This was considered to be the rule, by the Master of the Rolls, in Langham v. Nanny, 3 Ves. 467, who observed that, as the husband could not reach his wife's property vested in trustees, who had the legal interest, without application to chancery, he could not sue without joining her with him; and then the Court would make him provide for her, unless she consented to waive any provision. And, again, in Blount v. Bestland, 5 Ves. 515, Lord Loughborough declared the same thing, and that the husband could not file a bill for the wife's legacy without making her a party. And in Carr v. Taylor, 10 Ves. 578, the wife claimed a distributive share as next of kin to an intestate who died while she was a feme covert; and the Master of the Rolls observed, that, "whatever controversy there might have been upon the husband's right to sue in his own

name for the legal choses in action of his wife, he could not sue for this fund without joining her, and, if he had obtained a decree for it in her right, and died before he had reduced it to possession, it would have survived."

The case of Blount v. Bestland may also be referred to, in order to show that any indulgence given by the husband to the executor holding the legacy for the wife, and even receiving the interest of it, and suffering the principal to remain in the executor's hands after the executor had showed a readiness to pay it, does not alter the nature of the property, or reduce it to the possession of the husband, so as to take away the right of survivorship to the wife. In Wildman v. Wildman, 9 Ves. 174, we have an equally strong instance of protection given to the contingent right of survivorship. The wife, while under coverture, became entitled to a distributive share of personal estate, as next of kin, and which consisted partly in public stock. The administrator transferred her share into her name, and she and her husband had transferred some part of it, and the residue stood in her name at his death. The Master of the Rolls, without giving any opinion whether the husband had a right to have transferred the stock into his own or another name, held that, as the husband had not exerted any power to reduce it into possession, the property did not vest in him so as to prevent the wife from taking it A still more striking instance of the scrupulous as survivor. care over the wife's right appears in Baker v. Hall, 12 Ves. 497. The husband, as executor, took possession of the real and personal estate of the testator, and his wife was a residuary devisee. But, as the husband took possession in the character of trustee and executor of the will, and not as husband, the Master of the Rolls held that the wife's share of the residue of the personal estate could not be deemed sufficiently reduced into possession so as to prevent its surviving to her upon his decease. And it has also been since ruled (Wall v. Tomlinson, 16 Ves. 413), that a transfer of the wife's stock to the husband, merely as a trustee, was not a reduction into possession so as to bar her right of survivorship, for it was made diverso intuitu.

Under the doctrine settled in these cases, there is no pretence for the suggestion that the distributive share of Mrs. Schuyler, which remained in the hand of N. J. V., the administrator of the intestate, at the time of the death of S., was reduced into

the possession of S., so as to entitle his representatives to that share in preference to his widow. While the share remained in the possession of the administrator, it retained the character of assets, and the legal title and possession were in him, qua administrator. The distributive share continued in the possession of the administrator as much as the legacy continued in the possession of the executor in Blount v. Bestland. Schuyler had not attempted to exercise any authority or dominion over that property, by mortgaging it or assigning it. The letter of attorney authorizing N. J. V. to take out letters of administration and distribute the shares coming to the heirs, was a power executed by the husband and wife jointly, and the direction to pay over was a direction to pay to them jointly the share of the wife. administrator was to have been compelled by suit to distribute, it must have been by a suit in equity in their joint names; and, from what was said in Campbell v. French, 3 Ves. 321, it may be questioned whether the Court would not have required, under the circumstances of this case, the consent of the wife, before it required the administrator to pay to the husband alone. is nothing in this case to show that the husband ever intended, by any act of his, to appropriate this share to himself, so as to cut off his wife's contingent right of survivorship. We should act in contradiction to the whole course of the decisions, as well as to the truth of the fact, if we were to consider the share of the wife, before it passed out of the hands of the administrator, as being reduced to the husband's possession. The husband died before he or his attorney received the share now in question, and before he had exercised any authority or dominion over it. am, accordingly, of opinion, that the defendant, Sally H., upon the death of her husband, S., became entitled, in her own right, to that portion of her distributive share which had not been actually paid over to S. or to Bleecker, his attorney, in his lifetime; and I shall so declare the rule.

Decree accordingly.

HAYWARD v. HAYWARD.

(20 Pick. 517. Supreme Judicial Court of Massachusetts, 1838.)

Distinction between ante and post nuptial choses in action.

This was an appeal from a decree of the judge of probate. By an agreed statement of facts it appeared, that in November, 1831, Seth Hastings died intestate, leaving three children, one of whom was the appellant, at that time the wife of Caleb Hayward; that letters of administration on the estate of the intestate were duly granted to William S. Hastings; that in March, 1832, before any distribution of the personal estate was decreed, Caleb Hayward died intestate; and that letters of administration upon his estate were granted the appellee.

If upon these facts the Court should be of opinion that the appellee was entitled to a distributive share of the personal estate of Seth Hastings, the former accounts of administration settled by the administrator of Seth Hastings were to be opened, and the decree of distribution made on the settlement of the first account, whereby a portion of the personal estate in the hands of the administrator was distributed among the three children of Seth Hastings, was to be reversed, and a new distribution decreed and made. But if the Court should be of opinion that the appellant was entitled to a distributive share of such personal estate, then distribution was to be decreed accordingly of the balance remaining in the hands of such administrator, after deducting therefrom the sum of \$2,000, which was to be afterwards accounted for by him.

The case was argued in writing.

W. S. Hastings, for the appellant, cited 2 Kent (2d ed.), 135 to 143; Betts v. Kimpton, 2 Barn. & Adolph. 273; Toller, 217, 219, 220, 224, et seq.; 7 Am. Jurist, 321, 322, and cases cited; Mitford v. Mitford, 9 Vesey, 87; 1 Roper on Property of Husband and Wife, 201 et seq., 210, 223, 259, 260; Co. Litt. 351; Legg v. Legg, 8 Mass. 99; Draper v. Jackson, 16 Mass. 486; 1 Williams on Executors, 549 et seq.; Blount v. Bestland, 5 Ves. 515; Wildman v. Wildman, 9 Ves. 174; Nash v. Nash, 2 Madd.

133; Baker v. Hall, 12 Vesey, 497; 1 Dane's Abr. 342; 2 Com. Dig. "Baron & Feme," E. 3; Garforth v. Bradley, 2 Ves. Sen. 676; Richards v. Richards, 2 Barn. & Adolph. 447.

Washburn, for the appellee. The first question is, whether the interest of the wife in the distributive share in question was, before a decree of distribution was made, an interest in personal chattels or a chose in action.

In regard to real estate of an intestate, it is clear that it passes immediately upon his death to his heir. But with regard to the personal estate, the fee (if this term may be so used) of the chattels passes to the administrator, who holds them as trustee. The rights of the heir, or distributee, are merely inchoate, and cannot be enforced until after a decree of distribution; and then he is not entitled to recover a part of any specific articles, but only a share of the pecuniary value of the personal estate, if the administrator nelgects to sever and distribute the personal chattels to the respective distributees. The better opinion, therefore, seems to be, that the interest of the distributee is a chose in action. 1 Dane's Abr. 850, cites Taber v. Packwood, 1 Day, 150.

The next question is whether this chose in action, having accrued to the appellant during her coverture, vested absolutely in the husband, or whether, upon his death before a decree of distribution was made, it survived to the wife. We contend, that, upon the death of the intestate, this chose in action, this inchoate right to a distributive share of intestate personal estate, vested immediately in the husband, and must go to his representative, to be distributed as his estate. Toller on Executors, 224, 225; Clapp v. Stoughton, 10 Pick. 468; Commonwealth v. Manley, 12 Pick. 173.

The distinction between the cases seems to be this: The husband has only a qualified interest in choses in action belonging to the wife before marriage; and, unless he reduces them to possession during coverture, they become the sole property of the wife if she survives him. But as to choses in action acquired or accruing during coverture, the property in them vests absolutely and at once in the husband. Clapp v. Stoughton, 10 Pick. 468; Commonwealth v. Manley, 12 Pick. 173, and cases cited; Toller, 225; Com. Dig. (Day's ed.) "Baron & Feme," E. 3; Griswold v. Penniman, 2 Conn. 564.

Dewey, J., delivered the opinion of the Court. The question to be decided in this case, is, whether the share of personal intestate estate accruing in right of the wife during coverture vests absolutely in the husband, so that, in the event of his death before the decree of distribution, the wife will not be entitled to it by survivorship.

It seems to be very clearly settled, and by a uniform current of authorities, that the distributive share in an intestate estate, immediately upon the death of the intestate, vests in the heir-at-law; and, in case of his decease before a decree of distribution, the share belonging to him would go to his personal representative.

In Brown v. Shore, 1 Show. 25, the case is thus stated. J. S. died intestate, leaving A. and B. his next of kin. A. dies within a year, and before any actual distribution. It was held by Lord Holt that, by the death of J. S., A. acquired a present interest, and his share should go to his executor.

In Cary v. Taylor, 2 Vern. 302, it was held that one's share in an intestate estate is "an interest vested, and that before any distribution made, or the time by the statute limited for the making distribution was expired." So in Wallis v. Hodson, 2 Atk. 117, Lord Hardwicke says, the distributive shares vest immediately upon the death of the intestate. The same doctrine is found in 1 Madd. Ch. Pract. 637; Toller on Executors, 304; 2 Roper on Wills, 210; Bac. Abr. tit. "Executors and Administrators," I.

No objection, therefore, arises to the claim of property in the husband in the distributive share, from the fact that he deceased before the making of the decree of distribution. But the decision of this point does not settle the general question of the right of survivorship in the wife. The question still recurs, Does this interest in the distributive share accruing in the right of the wife during coverture so vest in the husband, that, in the event of his decease without any act on his part reducing it to possession, it shall not survive to the wife?

The general rule as to choses in action which belong to the wife at the time of the marriage is well settled. They do not vest absolutely in the husband. He acquires by the marriage only an inchoate right; he may reduce them to possession and take the avails of them; but if the wife survives the husband,

and the choses remain uncellected, she is entitled to them, and they do not pass to his personal representatives. The counsel for the administrator of the husband admits this to be the rule of law as to all choses in action thus situated; but he insists upon a different rule as to all choses and rights of action accruing during coverture, and claims that the latter, without being reduced to possession, vests absolutely in the husband, and in the event of his death do not survive to the wife.

Can this distinction be supported upon principle or by the adjudged cases? The only English authorities which are relied upon to sustain the position, that the right of survivership in the wife does not exist in a case like the present, are Cary v. Taylor, 2 Vern. 302; Teller on Executors, 225; and Com. Dig. tit. "Baron & Feme," E. 3.

The first of these has been already noticed as a case establishing the doctrine, that a distributive share in an intestate estate vests immediately upon the death of the intestate in the heir-at-It seems also to assume that such a distributive share law. accruing in right of the wife during coverture does not survive to the wife in case of the decease of her husband before reducing it It is often cited as a leading case to support such to possession. But in fact the question of the right of survivorship a doctrine. of the wife did not arise, as the husband survived the wife; and it further appears, from the judgment of the Court more fully stated in the later-edition of Vernon's Reports, edited by Mr. Raithby, that the case was decided in favor of the husband on the ground of his rights acquired under a marriage settlement, which had been made between the parties.

In Toller on Executors it is said, that a legacy given to the wife vests in the husband, and must be paid to him. The right of the husband to enforce the payment of a legacy given to his wife, and to assume the entire control and disposition of it, is unquestionable. He has also the same rights in relation to her choses in action belonging to her before the intermarriage. In the latter case, it is true, a suit must be instituted in their joint names; but this does not affect in the slightest degree his authority to release the demand, or to appropriate it exclusively for his own benefit.

We were referred to Comyn's Dig. (Day's ed.) tit. "Baron & Feme," E., as sustaining the right of the administrator of the

husband. The principle there stated, and which has a direct bearing upon the question, is only to be found among the addenda to Comyn by the American editor, and rests solely upon the case of Griswold v. Penniman, 2 Conn. 564, which will be hereinafter commented upon. Comyn also states another legal principle upon which some reliance may be placed by those who deny the right of the wife to take as survivor, and which may deserve consideration. He states the rule of law to be that, if a legacy is bequeathed to a feme covert, and she dies before the payment of the same, her husband, if he survives, is entitled to This position is undoubtedly well sustained by decisions both in England and in this country (Schuyler v. Hoyle, 5 Johns. Ch. 206), but is not considered, by those Courts that have thus ruled, as in any degree inconsistent with the doctrine of the right of the wife in case she is the survivor and the right has not been reduced to possession by the husband. Blount v. Bestland, 5 Ves. 615.

In addition to the English authorities, Reeve's Dom. Rel. 61, and the case of Griswold v. Penniman, 2 Conn. 564, were cited as sustaining the views of the counsel for the plaintiff.

Judge Reeve holds, as the rule at law, that a share of personal intestate estate accruing in the right of the wife during coverture vests absolutely in the husband, and does not, in the event of his death, survive to her; while he admits the doctrine in the Court of Chancery to be the other way. He cites no authority except the case of Cary v. Taylor, 2 Vern. 302, which, being a case in chancery, it would seem must have been overruled by the subsequent cases; and, as has been already remarked, the case alluded to was decided, not on the general question, but upon a marriage settlement. The opinion of Judge Reeve that the rule at law is as above stated, does not seem to be supported by any adjudicated cases in which the wife had attempted to enforce her claim as survivor, but rests upon the assumption that such must be the rule of law resulting as a necessary consequence from the well-established rule, that the husband may sue in his own name in causes of action accruing during coverture.

The case of Griswold v. Penniman was decided by the Supreme Court of Connecticut in accordance with the views suggested by Judge Reeve in his treatise just referred to. The

decision was placed upon the same ground, the Court holding the general doctrine to be that, if the husband may sue alone, the property demanded in the suit must have absolutely vested in him, and would not, in the event of his decease, have survived to the wife.

Is that doctrine correct? I think it is not; and that there are many cases in which the husband may sue in his own name without joining his wife, where the right of the wife as survivor is unquestionable. In the case of a bond given to husband and wife, the husband may sue in his own name. Ankerstein v. Clarke, 4 T. R. 616; 1 Dunlap's Practice, 42. So, on a covenant made with husband and wife, the husband may bring the action alone. Beaver v. Lane, 2 Mod. 217.

In/both of the above cases the right or cause of action would survive to the wife, if the husband did not reduce the same to possession during his life. Draper v. Jackson, 16 Mass. 482; Schoonmaker v. Elmendorf, 10 Johns. 49; 1 Dunlap's Pract. 43. In 2 Stark. Ev. 688, in notis, it is said that there are cases in which a cause of action accrues during marriage, which would survive to the wife, but where the husband may sue alone, as in case of a bond or promissory note given to the wife during See also 1 Barn. & Ald. 218. If this be correct, coverture. then the right of survivorship in the wife is not to be tested by the right of the husband to institute a suit in his own name. A test of a different character is more frequently mentioned in the books, viz., when the wife cannot maintain an action for the same cause, if she survives her husband, the action must be brought by the husband alone. Com. Dig. "Baron & Feme," W.; Bing. on Coverture, 253; 2 Stark. on Ev. 684, in notis; Draper v. Jackson, 16 Mass. 482. It must be conceded that the rules as to the joinder of husband and wife in actions at law are somewhat contradictory, as stated by different elementary writers and in the reported opinions of learned jurists. however, I think, be safely affirmed, that the right of the husband to sue in his own name does not necessarily prove that, as to the interest demanded in the suit, the property had vested absolutely in the husband, and would not have survived to the wife.

Leaving for the present the consideration of our own reported cases, it would seem that the doctrine that the wife has no right

of survivorship in choses in action accruing during coverture is found directly supported by no decisions to which we are referred, unless it be those of Cary v. Taylor and Griswold v. Penniman, and by no elementary writer except Judge Reeve.

The case of Robinson v. Taylor, 2 Bro. Ch. Cas. 589, is often cited as bearing upon this question; but it only establishes the right of the husband to assign a chose in action accruing during coverture. A treatise entitled "Baron and Feme" furnishes no authority for the doctrine, except the case of Cary v. Taylor so frequently alluded to.

On the other hand, as establishing the right of the wife by survivorship to interests accruing in her right during coverture, and which the husband has not assigned, released, or in any way reduced to possession, will be found the following authorities:—

In Garforth v. Bradley, 2 Ves. Sen. 676, it was held, that, whenever a chose in action comes to the wife, whether vesting before or after the marriage, if the husband die in the lifetime of the wife, it will survive to the wife, with this distinction, that as to those which accrue during coverture the husband may for them bring an action in his own name, may disagree to the interest of the wife, and a recovery in his own name is equivalent to reducing it to possession.

In Elliot v. Collier, 1 Wils. 618, Lord HARDWICKE fully sustains the right of the wife, as survivor, to choses accruing during coverture and not reduced to possession.

The case of Wildman v. Wildman, 9 Ves. 175, was thus: Mrs. Wildman, during coverture, became entitled to a distributive share of personal estate. A part of the estate consisted of three per cent stock. The administrator transferred her share into her name, and thus it stood at the death of the husband; and the question was whether this stock constituted a part of the husband's estate, or belonged to the wife by survivorship. The Master of the Rolls, Sir William Grant, says: "It is admitted that the interest which he took at the death of the intestate did not vest absolutely in the husband," and he held further, that the transfer of the stock to her name did not reduce it to the possession of the husband, so as to prevent her right by survivorship.

In Baker v. Hall, 12 Ves. 497, the wife was residuary devisee, and her husband was executor, and, as such, took possession of

all the cutate of the testator; but it was raied that the legacy to the wife, even with the possession of the husband as executor, was not vested in the husband so as to prevent its surviving to the wife upon his decease.

It was held in Richards v. Richards, 2 Barn. & Adolph. 447, that choses in action which are given to the wife either before or after the marriage survive to her after the death of the husband, provided he has not reduced them to possession. The case of Nash v. Nash, 2 Madd. 133, is also in point. In this case the father, after the marriage of his daughter, drew a check in her favor on his bankers for 10,000l. The bankers gave her a promissory note for the amount of the check; the husband had received on the note 1,000l, and the interest on the whole sum up to his death. It was held that, upon the death of the husband, the daughter was entitled to the note as a chose in action which had survived to her.

In the opinion given by Dampier, J., in the case of Philliskirk v. Pluckwell, 2 Maule & Selw. 393, is cited the case of Day v. Pargrave, decided in Trinity Term 18 and 14 Geo. II.; where Lee, C. J., ruled, if a bond is given to the wife during coverture, the husband and wife may have a joint action during their lives, or the husband may during coverture bring such action in his own name; yet, if he does not, it survives to the wife.

The general rule of law applicable to the present case is fully and distinctly stated in the treatise of Clancy on Husband and Wife, 4. It is thus: The choses in action accruing to the wife during coverture, as well as those belonging to her at the time of the marriage, are the husband's property only conditionally; that is, provided he reduced them into possession in her lifetime; and, if he do not, and he should die first, then she would take them by survivorship.

The doctrine of the right of survivorship in the wife to choses in action accruing during coverture has been very frequently recognized in this country. Our American commentator, Mr. Dane, is very explicit on the subject; holding that a legacy given to a woman during coverture, if not reduced to possession, survives to her, and also that, in a distributive share of an intestate estate thus accruing, she has the same right of survivorship. 1 Dane's Abr. 342, 344. Mr. Dane cites no authority

for these positions; but his decided views on the subject leave no reason to doubt he states the law as generally understood by his cotemporaries.

There is an early case which sustains the doctrine of the right of survivorship in the wife to a chase in action according during coverture, which will be found stated in American Precedents of Declarations (edition of 1810), 47.

It was the case of Foeter's Executor v. Smith, decided in the Supreme Court of Massachusetts, A. D. 1784. In this case a bond was given by the defendant to the wife of Foster, conditioned to pay her a sum of money, and the husband having died without reducing it to possession, the wife surviving, but she also having died before the payment of the money due on the bond, the executor of the husband brought an action to recover the same; but it was held by the Court that he could not sustain the action, as the right had survived to the wife.

In the Circuit Court of the United States held in Virginia (MARSHALL, C. J., presiding), in the case of Gallego v. Gallego, 2 Brock. 285, it was decided that a legacy is a chose in action, and the marital right of the husband to a legacy given to his wife does not attach until it is reduced to possession.

So in Wallace v. Talliaferro, 2 Call, 447, it was held that possession taken by the husband as executor is not such an appropriation as will prevent the wife's right of survivorship.

This subject has been very fully considered in the case of Wintercast v. Smith, 4 Rawle, 177, in which it was decided that a legacy given to a married woman belonged to the wife on the dissolution of the marriage, where the husband had not reduced it to possession. The right of the wife by survivorship as to choses in action accruing during coverture, had been previously recognized in Pennsylvania in the case of Lodge v. Hamilton, 2 Serg. & Rawle, 491. The same doctrine is held in the Courts of South Carolina. Harleston v. Lynch; 1 Desaus. 244; Clifton v. Executors of Haig, 4 Desaus. 330.

But a case more directly in point, and one entitled to great weight as giving us the opinion of a learned jurist, is that of Schuyler v. Hoyle, 5 Johns. Ch. 196. Mrs. Schuyler was one of the heirs-at-law of Gerritt Fisher, who died intestate, leaving a large personal property. Mr. Schuyler, her husband, died before the payment over by the administrator of Fisher of the distribu-

tive share of his wife, except a small sum which he had received. The wife of Schuyler claimed the balance as her property by right of survivorship; and the heirs-at-law of Mr. Schuyler claimed it as theirs, on the ground that the distributive share had vested absolutely in him. The question was fully argued, and the earlier authorities cited. Chancellor Kent, in the opinion delivered by him, says: "After looking into the authorities, and upon a consideration of the doctrine of the cases, there remains no doubt in my mind that the wife was entitled as survivor to all that portion of her distributive share which remained in the hands of the administrator of Mr. Fisher at the time of her husband's death." He further adds: "We should act in contradiction to the whole course of decisions, if we were to consider the share of the wife, before it passed out of the hands of the administrator, as being reduced to the husband's possession."

If this question be an open one in this Commonwealth, it seems to me very clear that the decided preponderance of authority in favor of the right of the wife should lead us to sustain that doctrine, unless it can be shown that these decisions are erroneous in principle. For myself, I cannot perceive any tenable ground for a distinction to be taken between choses in action accruing to the wife before or after coverture, as respects her right of survivorship. I can see a good reason why all her earnings should be entirely blended with her husband's. some reason for the technical rule which requires that the husband shall join his wife with him in all actions to enforce rights accruing to her before marriage, while he may or may not join her with him in actions where the interest accrued to her during coverture; but here, as it seems to me, the distinction ceases, and, as regards all rights acquired by devise, by the statute of distributions, or by gift from others, the rights of survivorship should be the same whether the interest accrues before or after marriage.

This brings us to the inquiry, has this question been judicially settled in this Commonwealth, and adversely to the rights of survivorship in the wife? It is not claimed that it has been, in any case arising under circumstances precisely like the present. But it is strongly urged upon us that, in several cases, certain principles have been recognized by this Court having a direct

bearing on the general question, and which are decisive against the defendant.

The cases referred to are those of Shuttlesworth v. Noyes, 8 Mass. 229; Clapp v. Stoughton, 10 Pick. 468; Commonwealth v. Manley, 12 Pick. 173; Goddard v. Johnson, 14 Pick. 352.

The first of these was a case of a promissory note, payable to a feme covert, the consideration of which was partly a debt due before marriage, and partly a sum due on the distribution of the estate of the father of the feme covert; and the question was, whether the maker of such a note could be summoned as trustee of the husband in a suit at law under our trustee process; and it was held that he might be.

It will be perceived that here was no question of right of survivorship, as both husband and wife were living. The question was merely whether a creditor might compel the exercise of the undoubted right of the husband to collect this chose in action. The case required no adjudication adverse to the rights of the wife by survivorship, and could only operate upon those rights indirectly. The husband has a qualified or conditional property in himself in all choses in action accruing during coverture; and he may, at his pleasure, during his life, reduce them to possession, and, in such an event, they become absolutely his. This right, and under the same limitations, this Court holds to be the subject of a process in favor of the creditors of the husband. We consider it as a statute assignment, and give the same effect to it, although effected by a compulsory process, as would be given to a voluntary assignment by the husband. am aware that on this point a different rule has been adopted in some of our sister States; but in this Commonwealth, the principles above stated have been often applied, and the rule is well settled.

In Commonwealth v. Manley, a question arose as to the property in a note given for a distributive share inherited by a feme covert, the note not being made to her as payee, but held as indorsee. The note was described in the indictment as the sole property of the feme covert, and the Court held that this was erroneous. Of the correctness of this decision there can be no question; inasmuch as, whether this note would or would not vest in the wife as survivor, the husband had, in either view of the case, a present interest in the note, and the rules of criminal

law require this interest to be accurately set forth in the indictment. The case itself therefore did not require a decision of the present question, and cannot be considered as a direct anthority in reference to it. It must be admitted, however, that in this, as well as in the case of Shuttlesworth a Noyes, there may be found dicta of the judge who pronounced the opinion, which, if they had been applied by the Court to a question arising upon a state of facts like those existing in the present case, would be strong judicial authorities against the right of the wife.

The case of Goddard v. Johnson, 14 Pick. 852, was an action brought by the husband, after the decease of his wife, to recover a legacy given to the wife during coverture. The Court sustained the action. That the avails of this legacy belonged to the husband is very clear, and, as has been before remarked, is in accordance with the rule of the English Courts; but it is not there understood as militating against the principle of the right of the wife to the legacy, if she survives, as is shown by the cases already cited on the general question. The only doubt as to this case is, whether the husband ought not to have taken letters of administration upon the estate of his wife, and instituted his suit as such administrator.

Clapp v. Stoughton, 10 Pick. 468, was a case where the wife had survived her husband, but she also had died before the action was brought; and the question raised was whether the administrator of the wife could maintain an action for the rents and profits of the real estate of the wife which had accrued during coverture, but had not been collected or reduced to possession by the husband. The decision was against the right of the wife; but it was remarked by the Court that the case was not free from doubt, and that the authorities were conflicting and not easily reconciled. It will readily be perceived that the above case differs materially from the case at bar. That denied the right of the wife, as survivor, to the income which had accrued during coverture from her real estate. In this the Court are asked to deny to the wife her right, as survivor, to the principal of a fund inherited by her during coverture. It would seem to be a very reasonable doctrine that the husband should enjoy, as his own acquisition, the annual income of the real estate of his wife. The effect of the marriage is to give him a freehold in

her real estate; and this should draw with it an absolute right to the rents and profits accruing from it during the continuance of his interest in the estate.

In considering the state of this question in reference to our own decisions, we should not overlook the case of Draper v. Jackson, 16 Mass. 480, where this Court ruled in favor of the wife, as survivor, as to the property of a note and mortgage given to the husband and wife during coverture. The principles settled in that case have been considered as modifying, if not overruling to some extent, the reported opinion pronounced by the judge who stated the decision of the Court in the case of Shuttlesworth v. Noyes. It is understood by the Supreme Court of Pennsylvania as entirely overruling it. 4 Rawle, 177.

Another case also entitled to some consideration is that of Deane v. Richmond, 5 Pick. 468, where the more immediate question decided was as to the effect of a divorce a mensa et thoro upon the choses in action accruing in right of the wife; but in the opinion of the Court it is distinctly stated, that a promissory note given to the wife during coverture, with the consent of the husband, for certain real estate of the wife, would survive to the wife in case of the death of the husband, if he had not reduced it to possession.

It seems to me, upon a careful review of all the cases in which this subject has been incidentally or otherwise before this Court, that the adjudications are not of so controlling and decisive a character as to preclude us from the full consideration of the question upon general principles, and with reference to the decisions of other judicial tribunals and the opinions of learned The result of such a consideration of the question now presented for our adjudication is a full conviction on our minds, that there is no such distinction, as to the rights of survivorship by the wife, between those choses in action that accrue before and those that accrue during coverture, as is claimed by the counsel for the administrator of the husband; but that, in either case, if the husband die without reducing them to possession, they survive to the wife. Such, I apprehend, is the well settled law of England, and the same doctrine has been distinctly recognized in the States of New York, Pennsylvania, South Carolina, and Virginia. It has had the sanction of Lords Hardwicke and Tenterden in England, of Chief Justice Marshall, Chancellor Kent, and many other eminent jurists in this country.

The Court are therefore of opinion that the appellant, Mrs. Hayward, is entitled to the distributive share in the estate of her late father, which descended to her during coverture, her husband having deceased without reducing it to possession.

Decree in favor of the appellant.

GRISWOLD v. PENNIMAN.

(2 Conn. 564. Supreme Court of Errors of Connecticut, 1818.)

Distinction between ante and post nuptial choses in action.

This was an action on a probate bond, tried at Norwich, January Term, 1818, before Swift, C. J., and Brainard and Goddard, JJ.

Joshua Starr died intestate, leaving personal estate and several children, one of whom was the defendant, Mary Penniman, then wife of John Penniman. Administration was taken on the estate of the deceased; but no distribution was made to the heirs until after the death of John Penniman.

On his decease, the defendant, Mary Penniman, took administration on his estate, and gave the bond on which this suit is brought, for the faithful performance of her trust. The breach relied on was that she had not inventoried, as the estate of John Penniman, that portion of the estate of Joshua Starr, consisting of personal property, which was distributed to her as one of his heirs. The plaintiff contended that this property, on the death of Joshua Starr, vested absolutely in the husband.

The defendants contended, that it vested in Mary Penniman, as a chose in action not reduced to possession, and so remained during the coverture, and, on the death of her husband, survived to her. The Court decided this point, and rendered judgment in favor of the defendants.

The plaintiff moved for a new trial; and the motion was reserved in the usual manner.

Cleaveland and T. S. Williams, in support of the motion, [cited Com. Dig. tit. "Baron & Feme," E. 3, citing 2 Rol. 134; Bac. Abr. tit. "Baron & Feme," D.; Palmer v. Trevor, 1 Vern. 261; Ayer v. Fitch, 2 Conn. 145, 146; Reeve's Dom. Rel. 60; Barlow v. Bishop, 1 East, 432; Shuttlesworth v. Noyes, 8 Mass. 229; Cary v. Taylor, 2 Vern. 302.]

Goddard, contra, [cited Garforth v. Bradley, 2 Ves. 676; Coppin v.—, 2 P. Wms. 497; Carr v. Taylor, 10 Ves. Jr. 578; Reeve's Dom. Rel. 62; Prat and ux. v. Taylor, Cro. Eliz. 61; Brashford v. Buckingham and ux. in error, Cro. Jac. 77, 205; Hilliard v. Hambridge, Aleyn, 36; Rose and ux. v. Bowler et al., 1 H. Black. 108, 114; 1 Chit. Pl. 20.]

Swift, C. J. The husband, by marriage, acquires a right to the use of the real estate of his wife during her life; and if they have a child born alive, then, if he survives, during his life, as tenant by the curtesy. He acquires an absolute right to her chattels real, and may dispose of them. If he does not dispose of them, and survives his wife, they survive to him; but, if she outlives her husband, they survive to her. He acquires an absolute property in her chattels personal in possession; but, as to her choses in action, he may maintain a suit jointly with her to recover them; and, if he reduces them to possession during coverture, they become his; otherwise, they survive to the wife if she outlives him, or to her administrator if she does not. the property of the wife accruing during coverture, the same rule is applicable, excepting in regard to choses in action. These vest absolutely in the husband, on the principle that husband and wife are but one in law, and her existence in legal consideration is merged in his. He may, in such cases, bring a suit in his own name, without joining his wife. This clearly proves that the chose in action vests in him absolutely; for if the right was in the wife, she must necessarily join in the suit. Where a bond or note is given to the wife, the husband can maintain an action Barlow v. Bishop, 1 East, 432; Aleyn, 36. in his own name. The consequence, then, is, that if the husband die before the wife, such choses in action shall go to his executor or administrator, and they do not survive to the wife; for where the property has been absolutely vested, there can be no survivorship.

It is true in certain cases, where claims originate during coverture, the husband may sue in his own name, or may join with

the wife, as for rents issuing out of her real estate, or where she is the meritorious cause of action; and then, if the husband die while the suit is pending, or after judgment, and before it is satisfied, the interest in the causes of action will survive to her, and not to the executor of her husband, though if he had sued alone she would have had no interest. 1 Chit. Plead. 19, 20.

But this is far from proving that, if no suit had been brought, the chose in action would have survived to the wife; it proves directly the contrary. For in this case the joining of the wife in the suit is the ground of the survivorship. It is agreeing to and recognizing her interest by the husband, and may be considered in the nature of a grant to her; and, for this reason, the suit or judgment may survive to her. But where no act is done by the husband, where no suit is brought or judgment rendered in favor of both, his separate, absolute interest continues, and can never survive to the wife.

It is true that a contrary doctrine is laid down by Lord Hardwicke, in Garforth v. Bradley, 2 Ves. 676, on the authority of which the case was decided at the circuit. He says that a chose in action coming to the wife during coverture, unless the husband reduce it to possession, will survive to the wife; but agrees that the husband may bring an action in his own name. This opinion is contradictory to the whole current of authorities; and the concession that the husband may sue in his own name proves that the property absolutely vested in him, so that it could not survive without some act done by him.

If the estate left by the father of Mrs. Penniman was chattels personal in possession, then they vested, at the time of his death, in her husband; for a distributory share of chattels personal in possession is not a chase in action; the right does not depend on the distribution, but originates by the statute, at the time of the death of the intestate. If he left debts which it was the duty of his administrator to collect, these would be choses in action which, by the common law, vested in the husband on the death of her father.

It has been said that a different rule has been adopted in equity; but this is a mistake. Courts of equity, when husbands are obliged to resort to them to obtain possession of the property of their wives, have required that they should make reasonable provision for them, as when they apply to obtain legacies; but

with respect to choses in action accruing during coverture in right of the wife, where the kesband can sue in his own name without joining the wife, there has been no rule adopted in chancery different from taw.

The other judges were of the same opinion.

New trial to be granted.

BLOUNT v. BESTLAND.

(5 Ves. 515. High Court of Chancery, 1800.)

What amounts to Reduction: mere Intent to reduce. — Possession.

SARAH BREWIN by her will gave to Ann Simpson, wife of Thomas Simpson, the sum of £600, to be paid her by the executrix of the said will within twelve months after the decease of the testatrix; and she appointed her niece, Susannah Bestland, executrix.

The testatrix died in 1799. Above a year after her death, Hacmas Simpson died; having by his will disposed of the legacy of £600 to his wife for life, and after her decease to his children, and given his wife another incansiderable benefit. His widow, having two children by him, married William Blount. The bill was filed by Blount and his wife, claiming the legacy, against the executrix of Mrs. Brewin, the executor of Thomas Simpson, and the two infant children.

The defence set up by the answer of the executrix, and also supported by her depositions, taken from the children, was, that she became entitled as executrix to £600, secured to the testatrix, her executors, &c., upon a mortgage of the freehold estates

"See Baldwin v. Carter, 17 Conn. 201; Fitch v. Ayer, ante [2 id.], 143; Cornwall v. Hoyt, 7 Conn. 420; Morgan v. Thames Bank, 14 Conn. 99; Whitaker v. Whitaker, 6 Johns. 112; Commonwealth v. Manley, 12 Pick. 173; Wheeler v. Bowen, 20 Pick. 563. In Hayward v. Hayward, 20 Pick. 517, Dewry, J., comments at length upon

this case, and holds a contrary doctrine. See also the case of Schnyler v. Hoyle, 5 Johns. Ch. 196. The case in the text, however, has ever since been regarded as settled law in Connecticut." — Editor 2d ed. Conn. See, however, Tuller v. Naugatuck R. R. Co., 21 Conn. 574.

of Wissendine, in the county of Rutland, belonging to the defendant's mother; and the defendant, conceiving herself liable to pay to Thomas Simpson the legacy of 600l., a short time after the expiration of twelve months from the death of the testatrix had some conversation with Simpson relative to the said legacy; and she intimated her willingness to pay him the legacy, but, not having the money ready, she told him it should be paid by the money due upon the said mortgage upon the estate at Wissendine; and that she would call in that money for the purpose of such payment, if he wished it. He said he did not want it just then; and he would rather it should lie where it was, and he receive the interest till he wanted it; to which the defendant agreed. In consequence she paid him 121. upon the 20th of October, 1791, and 121. upon the 5th of June, 1792; taking receipts from him of those dates, expressed thus: "Received of Susannah Bestland, as executrix of Mrs. Sarah Brewin, the sum of 121., being for half a year's interest for 600l. left to my wife by Mrs. Brewin's will as charged upon the estate at Whitsendine in Rutland."

This conversation was not acted upon further. The answer submitted the propriety of a settlement if the plaintiffs were entitled; stating that no settlement had been made upon the plaintiff Ann Blount and her children upon her second marriage; and that her husband had been her servant.

The Solicitor-General [Sir William Grant], and Mr. Romilly, for the plaintiffs.

The interest in this legacy survived to the wife upon the death of her first husband, having never been reduced into possession. The transaction that took place with the executrix, being only an agreement to appropriate that mortgage, was not sufficient to reduce it into possession. Bates v. Dandy is exactly this case.

The Attorney-General [Sir John Mitford], Mr. Hollist, and Mr. Stanley, for the defendants.

It is very unfortunate if this sum is not to be considered so appropriated as to have vested in the first husband, who, conceiving it his, made a disposition of it in favor of his wife and children, for whom no provision has been made on the second marriage. It is clear upon the two receipts that he accepted the

mortgage as an appropriation to him of so much of the testator's estate in satisfaction of that legacy. Bates v. Dandy was very different. In this case the legal estate was in this defendant; and, after the transaction between her and Mr. Simpson, he might have sued her without his wife. In the other case, that was impossible, the wife being administratrix. The right of action therefore did not survive in this case. Secondly, the plaintiff Ann Blount, if she is entitled, must elect, and therefore must give up all benefit under the will of her former husband; and, as this man has made no provision for her, some direction ought to be given for paying the money into Court.

The Solicitor-General [Sir William Grant], in reply, observed upon the second point, that no question of election was raised by the answer.

LORD CHANCELLOR [LOUGHBOROUGH]. Could the first husband have brought a bill without making his wife a party? He could not bring an action for the legacy; though that would have done at one time. All that has been done was nothing more than an executor admitting a legacy to be due, and that he has assets. No Court of law would have entertained an action upon it; and, if the husband had sued here, the wife must have been a party. It is very unfortunate. The least thing would have done; if she had assigned. I agree this is an appropriation; but it is an appropriation of that which is in effect a chose in action, and could only have been obtained by suit to which the wife must have been a party. It is very proper that the money should be paid into Court.

I shall direct Susannah Bestland, in whom the mortgage is now vested, to call in the money; and declare that the plaintiff Ann Blount is entitled to the same; and the interest due at the time of her marriage with the other plaintiff to be added to the principal; and that she is not entitled to any benefit under

¹ As to election, see Wollen v. Tanner, 5 Ves. Jr. 218; Long v. Long, id. 445; Yate v. Moseley, id. 480; Ward v. Baugh, 4 id. 623; Wilson v. Lord John Townshend, 2 id. 693; Butricke v. Broadhurst, 1 id. 171, note (a), (Sumner's ed.); Blake r. Bunberry, id. 514, note (a), s. c. 4 Bro. C. C. 21.

² See Schuyler v. Hoyle (ante).

^{*} See 2 Ves. Jr. 676; Mealis v. Mealis, in Chancery, Hil. Term, 1764, MS., where an injunction was granted at the suit of a married woman to stay proceedings in the Ecclesiastical Court, in a suit instituted by her husband to obtain a legacy in her right, without having made a settlement.

the will of Thomas Simpson, she electing to take against the will. Let the plaintiff William Blount lay a proposal before the master for a settlement. Tax all parties their costs: the interest of the sum due upon the mortgage to be applicable to the costs in the first place; and, if not sufficient, the deficiency to be taken out of the principal.

NASH v. NASH.

(2 Madd. 133. Court of the Vice-Chancellor of England, 1817.)

What is a Sufficient Reduction of the Wife's chose in action; Possession of Instrument evidencing it.

THE original bill stated that, in July, 1808, a marriage was had between William L. Nash and Catharine Evans; that no settlement was made on the marriage, but on the 23d of November, 1813, David Evans, Esq., the father of Catharine, drew a check on his bankers, in favor of his daughter, for 10,000l., and on that day she presented the check, and took from the bankers a promissory note, payable on demand, for 10,000l., which note she delivered to her husband; that the money remained in the hands of the bankers during the life of William L. Nash, except 1,000l. which he applied for to the bankers, and was paid by them, and for which he gave a receipt; and that he received the interest on the remaining 9,000l. during his life, and gave receipts for the same; that William L. Nash, by his will, 8th December, 1815, amongst other bequests, gave the plaintiff 'L. Nash (his mother) an annuity of 40l., and appointed his wife, Catharine Nash, and two other persons, executors of his will; that he afterwards, on the 8th January, 1816, died, leaving the said Catharine Nash and the plaintiff Ann Nash surviving; that Catharine Nash alone proved the will, and obtained possession of the testator's personal estate and effects, including the note for 10,000l., of which 9,000l. so remained unpaid. of the original bill was, that the 9,000% due on the promissory note might be declared to form part of the testator's personal

estate, and that an account might be taken of what was due to the plaintiff in respect of the annuity given by the testator's will.

The defendant by her answer insisted that the 9,000l. secured by the promissory note was a chose in action, and that, William L. Nash never having reduced the same into possession, it did not form part of his personal estate, but belonged to her; and that his property, independent of that money, was but sufficient for the payment of his debts.

After the bill was filed, and the answer put in and replied to, Ann Nash, the plaintiff in the original bill, died, and letters of administration were granted to John Nash (the plaintiff), who filed a bill of revivor.

Mr. Wingfield and Mr. Whitmarsh, for the plaintiff. The 9,000l. remaining due on the note must be considered as the property of the deceased husband. A wife cannot acquire property during the coverture; it belongs to her husband. The husband might alone have brought an action upon the note.

In Lightbourne v. Holyday, the plaintiff gave a feme covert

¹ 2 Eq. Abr. 1. The following report of this case is from a MS. note.

Holloway r. Lightbourne, Easter Term, 12 Geo. II., 1739. The bill in this case was brought, suggesting fraud and want of consideration in obtaining a promissory note from the plaintiff by the defendant's wife, setting out the note to be in this form: "Received of Mrs. Lightbourne 300l., for which I am to be accountable;" and prayed that this note should be delivered up, and the defendants restrained by the injunction of the Court from any proceeding at law upon it; and, the defendants not answering in time, the common order of course for an injunction was made; and, before any answer came in, the defendant Lightbourne, the husband, died, on which it was moved that the injunction might be dissolved, the cause being abated; but, on the other hand, it

was insisted that here is no abatement, for the note being given to the wife, and she surviving the husband, the interest in the note had vested in her, and would not go to the executor of the husband. But Lord HARDWICKE, Chancellor, having taken time to consider of it, declared this to be an abatement, and that the interest in this note by the death of the husband vested in his executor, and did not survive to the wife. It is not like the case of a bond or note given to a feme sole who after marries and survives her husband; in such case 't is certain, if the money be not received upon the bond or note, that it shall survive to the wife, and shall not go to the executor of the husband; and if during the coverture 't is put in suit, it can't be by the husband alone (3 Lev. 403; 1 Eq. Cas. Abr. 64; 1 Vern. 393); but in such case, the property being

a promissory note, and, the husband dying before answer to a bill for discovery of the consideration, the wife administered to him; and Lord Chancellor held that, as a wife can have no separate property, but whatever she gets during the coverture vests in the husband, the property of this note was wholly his, and that she had no interest in it but as representing her husband; and that, therefore, by his death the suit was abated. So, in a case in Bunbury, it was held that a note given to a feme covert was upon her husband's death to be considered as his assets. The husband in this case received part of the money due on the note, and all the interest from time to time, up to the time of his death, which must be considered as a reduction into possession of a note.

Mr. Bell and Mr. West, for the defendant. The case in Bunbury cannot be relied upon. He is a reporter of little authority. It is very clear that the note for 500l given in that case being intended for the separate use of the wife, she might have insisted upon having it so settled. The case cited from 2 Eq. Cas. Abr. is also from a book of no estimation. Subsequent cases clearly show that this chose in action survived to the wife.

In an anonymous case in Atkins, a bill was brought by husband and wife for a demand in right of the wife, and the husband died. Lord Hardwicke said: "It was in the nature of a chose

in the wife, the husband is rather joined for conformity than from the nature of the cause of action. But where a bond or promissory note (which is much stronger than the present case, for here is no promise to pay to the wife) is given to a feme covert, it hath been held that the interest in such bond or note immediately vests in the husband, and that he may maintain an action upon it in his own name. So was Howell's case, in 3 Lev. 403; (a) it was debt on bond to the wife. The husband sued alone, without naming the wife; defendant

(a) It is this case which seems to have been alluded to by Lord Chief

having craved oyer of the bond, demurred, and the plaintiff had judgment, which shows that the property of a bond or note generally which is given to a feme covert is vested in the husband. This cause, therefore, is now abated, and the injunction ought to be dissolved, but I will give the plaintiff a week's time to revive.

- ¹ Hodges v. Beverly, Bunb. 188.
- ² See Bridg. Leg. Bibl. 112; The Reporters, 305; Marv. Leg. Bibl. 48, and authorities cited.
 - 8 3 Atk. 376.

Justice North, in Beaver v. Lane, 2 Mod. 217.

in action, and survives to her, and the cause does not abate by the husband's death.

Although the husband obtains a judgment for a debt due to his wife, yet if he dies before execution the wife is entitled, and not the representative of the husband." 1

So in Coppin v. ——, 2 Lord King held that, "if a bond be given to husband and wife during coverture, on the husband's dying first it survives to the wife, as all other joint choses in action do; though, it is true, the husband may disagree to the wife's right to it, and bring the action on the bond in his own name only; but, till such disagreement, the right to the bond is in both the husband and wife, and shall survive." In a recent case, Philliskirk against Pluckwell,8 a question was made, whether husband and wife may sue on a promissory note made to the wife during coverture. Lord Ellenborough was of opinion they might; and says: 4 "In Co. Litt. 120,5 and in 1 Rol. Abr. Baron & Feme, H. pt. 6 & 7, a difference is taken between a thing that is not merely a chose in action and one that is; and therefore, in the case of a bond made to the wife, if the wife dieth, the husband shall not have it without taking administration, because that is merely in action. So here the note is made to the wife: and it imports consideration, unless the contrary be shown;" and Mr. Justice Dampier, who concurred with Lord ELLENBOROUGH, cited "Day v. Pargrave, in which Lee, C. J., said, that, where a bond is given to the wife during coverture, no action will lie upon it by the wife solely; but they may have a joint action during their lives, or the husband may bring such action during the coverture in his own name; yet, if he does not, it survives to the wife. There the action was by the husband as administrator on an obligation to the wife during coverture; and it was resolved that it was well brought, for it would have survived to her." This case, therefore, is in point to show that in the present case the chose in action survived to the wife.

¹ Bond v. Simmons, 3 Atk. 20.

² 2 P. Wms. 497.

^{* 3} Maule & Selw. 393.

^{4 3} Maule & Selw. 395.

⁵ The passage in Co. Litt. runs thus: "If a feme covert be seised of an advowson, and the church becom-

eth void, and the wife dieth, the husband shall present to the advowson; but otherwise it is of a bond made to the wife, because that it is merely in action."

⁶ 3 Maule & Selw. 367.

In Wildman v. Wildman, it was held that stock transferred into the name of a married woman, as next of kin of an intestate, upon the death of her husband, without having done any act with reference to it except signing partial transfers by her, survived to her. These cases are opposed only by the case in Bunbury, and in 2 Equity Cases Abridged, — cases of slight authority.

The VICE-CHANCELLOR. It appears to me that this note given by the bankers to the wife must be considered as a chose in action which has survived to her. If, immediately after the check was given, the husband had died, the check did not give a legal right to sue the bankers; and, if they refused payment, the father could alone have recovered against them. The note given by the bankers constituted a chose in action. It gave a right to recover; but it was merely a chose in action, and not like money The receipt by the husband of the 1,000l., and of or a chattel. the interest from time to time till his death, was not a reduction into possession of the remaining 9,000%; it did not alter the nature of the note; it still remained a chose in action, a security for the remaining 9,000l. Day and Pargrave, cited by Mr. Justice Dampier in Philliskirk v. Pluckwell,2 is expressly in point. The bond given in that case to the wife not having been reduced into possession in the husband's lifetime, the judges held it survived to the wife; and being a specialty debt in that case and in this a simple contract debt makes no difference. Wildman v. Wildman in principle applies to this case. stock transferred to the wife did not only give him a right, if he chose, to reduce it into possession, but, as he did not do so, it survived to the wife.

In the case of Philliskirk & Wife v. Pluckwell, the question arose, whether the husband and wife may sue on a promissory note given to the wife during coverture. It was determined they might join in the action. If the property had been absolutely vested in the husband, there could be no reason for the wife joining in the action; but she joined because by survivorship she would become entitled.

The cases I have adverted to are modern authorities, and appear to me decisive; but, before I finally decide, I will look

¹ 9 Ves. 174.

^{* 9} Ves. 176.

² 2 Maule & Selw. 396, 397.

^{4 2} Maule & Selw. 393.

into the cases cited from second Equity Cases, and from Bunbury, books certainly of no great authority.

The Vice-Chancellor the next day said he remained of the opinion he expressed.

V

STANDEFORD v. DEVOL.

(21 Ind. 404. Supreme Court of Indiana, 1863.)

Reduction to Possession of Wife's choses in action. — Intention to reduce.

APPEAL from the Putnam Circuit Court.

Worden, J. This was an action by the appellees against the appellants, the object of which was to reach certain lands in the hands of Joseph Standeford, and apply the proceeds to the payment of certain judgments held by the plaintiffs against John Standeford, on the ground that the money of said John had been invested in the purchase of said lands. Trial, verdict, and judgment for the plaintiffs.

The following is the case made by the evidence: The plaintiffs are the judgment creditors of John Standeford, who is insolvent. About the year 1848, one Josiah Harding made a contract with Hannah Standeford, wife of said John, and Sarah, their daughter, who was then about eighteen years of age, for the sale to them of the land in question, at the price of \$1,000, one half of which was paid down, and a title-bond executed for the conveyance of the land to said Sarah. Mrs. Standeford and Sarah executed their promissory note for the residue of the purchasemoney, payable in twelve months. The residue of the purchasemoney being afterwards paid, the title-bond was surrendered, and, by an arrangement of the parties, a conveyance was executed to one William L. Mahan, a son-in-law of Mr. and Mrs. Stande-Such further conveyances were finally made as vested the ford. title in Joseph Standeford, who is a son of Mr. and Mrs. Standeford. Joseph, it may be observed, is not in a position to hold the land free from the claims of the plaintiffs, if the money invested therein be deemed to have been the money of John

Standeford, his father. The first payment on the land was made in part by the transfer of a promissory note to Harding, which Mrs. Standeford held in her own right. Her husband had nothing to do with the transfer. Except the note above mentioned, Mrs. Standeford paid for the land with her own money, which she received from the estate of her grandfather. This money was received by her long after her intermarriage with Standeford, and never went into his possession; nor did he ever receive or claim it, by virtue of his marital rights or otherwise. He never paid anything on the land, nor had he anything to do with the contract of purchase. The money thus received by Mrs. Standeford, and paid for the land, did not come to her with any kind of limitation to her separate use. Standeford and his family have had the use and occupation of the land since it was thus purchased.

The above are believed to be all the material facts in the case, as condensed from the testimony of the witnesses. It is not a case of conflict of evidence; and the question arises, whether, on the foregoing facts, the plaintiffs were entitled to recover.

Was the money thus invested in the land in legal contemplation the money of the husband, in such sense as to enable his creditors to pursue it? The case must be decided upon the law as it stood before our recent statutes enlarging the rights of married women. Had the money in question been in the hands of Mrs. Standeford at the time of the marriage, the case would have been covered by what was said in the case of Miller v. Blackburn, 14 Ind. 62, in overruling the petition for rehearing. On page 82, the following language is employed: "The money invested in the land, not being the separate property of the wife, became, in my opinion, the property of the husband by virtue of the marriage. It was not a mere chose in action, which, in order to make it the property of the husband, required a reduction to his actual possession. Money in the hands of a guardian is deemed, in law, to be in possession of the ward, and that possession of the ward became the possession of her husband upon her marriage." The case goes upon the theory that the money was in the possession of the wife (the possession of her guardian being her possession) at the time of the marriage. If we were right in assuming that the possession of the guardian was the

possession of the ward, the doctrine stated is sustained by the authorities. Says Mr. Kent, 2 Com. (10th ed.) p. 135: "As to personal property of the wife which she had in possession at the time of the marriage, in her own right, and not en autre droit, such as money, goods, and chattels, and movables, they vest immediately and absolutely in the husband, and he can dispose of them as he pleases; and on his death they go to his representatives, as being entirely his property." But the case before us is an entirely different one. Here the claim due to Mrs. Standeford, before it was paid to her, was at most but a chose in action; and the husband was not the owner until he had reduced it to his possession, which he never did. "Marriage is only a qualified gift to the husband of his wife's choses in action, viz., that he reduce them into possession during its continuance," &c. 1 Bright's Hus. & Wife, 36; 1 Kent, Com. 122. Says Mr. Bright, p. 48: "A mere intention to reduce the wife's choses in action into possession will be insufficient. The acts to effect that purpose must be such as to change the property in them, or, in other words, must be something to divest the wife's right, and to make that of the husband absolute." Indeed, the husband may take possession of his wife's choses in action without making them his own. "If he take possession in the character of trustee, and not of husband, it is not such a possession as will bar the right of the wife if she survive him. The property must come under the actual control and possession of the husband quasi husband, or the wife will take as survivor, instead of the personal representatives of the husband." 2 Kent, Com. 127.

In Hill on Trustees (3d Am. ed.), page 621, note, it is said: "What will constitute actual reduction to possession is not susceptible of exact definition, but depends on intention. There must be some distinct act evincing a determination to take as husband."

These are elementary principles, and, applied to the case before us, show that the money invested in the land by the wife was not the money of the husband. He not only never had the possession of the money, but he did no act whatever evincing an intention to claim it or make it his by virtue of his marital rights. On the contrary, he left it in the possession and entirely under the control and dominion of his wife, and suffered her to

invest it as above stated, thereby showing that he did not intend to claim it or make it his own. Indeed, there is no ground to claim that the money was that of the husband, unless it be upon the ground that the receipt of the money by the wife during the coverture made it ipso facto the money of the husband. there is this difference between things in action and in posses-It is undoubtedly true, as was held in the case of Miller v. Blackburn, supra, that money or other personalty in the possession of the wife, in her own right, at the time of the marriage, vests absolutely in the husband, without any further act on his But where there is a chose in action due part to make it such. to the wife at the time of the marriage, or accruing to her during the coverture, he, in order to make it his, must do some act evincing an intention to make it his own; in the language of the books, his acts must be such as to change the property and divest his wife's right.

But this doctrine does not rest upon the elementary books alone; the adjudicated cases fully sustain the proposition that, in the case before us, there was no such reduction of the money to the possession of the husband as to make it his. Some of these cases will be adverted to. The case of Totten v. McManus, 5 Ind. 407, was a bill filed by a creditor of McManus to reach certain lands purchased by his wife after coverture with means which she had before marriage, but which she reduced to cash after marriage. It was claimed that the money, the moment it came into the hands of the wife, became the property of the It was held otherwise by the Court. This case is less satisfactory than it would have been had it appeared clearly whether the property which the wife thus turned into cash was limited to her separate use. The case goes on the theory that the property was the wife's separate property, and is, therefore, perhaps not strictly in point here. But in Miller v. Blackburn, supra, it was said by Perkins, J., in speaking of the case of Totten v. McManus: "There the husband did not reduce the property of the wife to possession. He permitted her to retain and vest it in real estate in her own name. When that was done, it was placed beyond his reach, without the aid of a Court of Chancery. It remained the wife's property unreduced." In the case of Gochenaur's Estate, 23 Penn. St. 460, the Court, after quoting the passage from Kenr to the effect that the prop-

erty must come under the control and possession of the husband as husband, proceeds as follows: "This distinction has been fully adopted in Pennsylvania, and a series of well considered cases, carrying out the principle to its logical result, has established that reduction into possession, so as to work a change of ownership, is a question of intention to be inquired of upon all the circumstances. Conversion is not reduction into possession, but only evidence of it; and therefore conversion may be explained by other evidence, negativing the intention to reduce to possession in such a manner as to-transfer the title. According to these cases, marriage is treated as only a conditional gift of his wife's choses in action, or, to speak more accurately, a gift to the husband of her power to dispose of them to himself or any one else, by force of the dominion to which he has succeeded as the representative of her person; and, because the gift is conditional, he has a right to reject it by refusing to perform the condition. The law does not cast it upon him beyond his power of resistance; for every gift requires the assent of the donce, and hence clear proof that the husband received the wife's money as a loan, or a disclaimer of intention to make it his own property, proved by his admissions, will preserve her right of survivorship."

The case of Timbers n. Katz, 6 Watts & Serg. 290, was much like the present in many of its features. There a married woman had a sum of money due to her on a bond. The money was paid to her by the obligor, and, upon payment, she and her husband executed a receipt to the obligor for the payment. She afterwards invested the money in land in the name of her daughter. It was held, Gibson, C. J., delivering the opinion of the Court, that the transaction was not only not fraudulent, but that the money was not the money of the husband, it not having been reduced to his possession; and that the creditors of the husband could not pursue it into the land. This is a very well considered case, in which the law is clearly stated, and is strictly in point with the one before us.

We have only to observe, further, that there is no ground whatever on which to claim that the note transferred by Mrs. Standeford, in part payment of the land, had been made the property of her husband by any act of his whatever.

We are of opinion that, on the case made by the evidence, the

plaintiffs were not entitled to recover; and hence that a motion for a new trial, which was made, should have prevailed.

Per Curiam. The judgment below is reversed with costs, and the cause remanded.

MAYFIELD v. CLIFTON.

(3 Stewart, 375. Supreme Court of Alabama, 1831.)

Distributive Share reduced to Possession during Coverture. — The Possession of the Husband in his own Right.

This was a writ of error sued out by Thomas Mayfield, guardian of Nancy Murphy, to reverse the decision of the judge of the County Court of Madison County, made at June Term, 1829, on the hearing of a petition filed by Mayfield in that Court against Thomas Clifton. Mayfield, in his petition, represented that Thomas Murphy, of Madison County, died in 1815, possessed of negroes and other personal property; that his estate was unembarrassed and free of debt; that he left his widow, Frances J. Murphy, and two infant children; Nancy, of whom he, the petitioner, was guardian, and John, of whom Clifton was guardian; that the widow was appointed administratrix of the estate, by the County Court of Madison, and shortly afterwards intermarried with Clifton, and that she died in 1827. Whereupon, he prayed a legal distribution of the estate. The cause was submitted to the decision of the judge of the County Court, under an agreed statement of facts, which was in the following words: "We agree that the property referred to belonged to Thomas Murphy, who died at the time stated in the petition, leaving his widow, Frances J. Murphy, and two children named in the petition; that the said widow administered upon the estate of said Murphy, and, after obtaining the grant of administration, intermarried with Thomas Clifton; that the property was in possession of the said Frances from the death of the said Murphy till her second marriage, and from that event in the possession of herself and the said Clifton till her death, which occurred at the time mentioned in the petition, and that no distribution of said property was ever made between the said Frances in her lifetime and the

children of Murphy." Upon this statement of the facts, the County Court decreed that the property should be divided between the children of Murphy and Thomas Clifton, it being the opinion of the Court that Clifton was entitled to the distributive share of his deceased wife, although there had been no distribution made in the lifetime of the wife. Mayfield prosecuted his writ of error to reverse this decree in the County Court.

Hopkins, for the plaintiff in error. It is a well settled principle of law, that, unless the husband reduce the personal property of the wife into possession during coverture, he can acquire no right to it. I understand the Court below to have gone on the ground that the husband here had possession; but his possession was as administrator. As the estate was never divided, if the doctrine to be maintained in support of the decree be correct, then he held possession of the whole estate in his own right. A change of the character of possession could only take place by a division, otherwise he holds the whole as administrator, and such division could only be made by an order of Court; he could not divide for himself. If the doctrine be correct, the County Court has nothing to do but to distribute to the representatives. And, suppose the property had remained thus until the children had become of age, how could application for distribution be made but by himself and wife? it could be made in no other way. No such application has been made, and, if it had been, it has not been decided on. In all personal property and choses in action of the wife, the husband acquires no rights until reduced into possession during coverture. That he has never done here, and the right must now be denied him. He could claim it only in right of and jointly with his wife; he had his petition or action in her name and right; but the action of husband and wife is now gone, and he never can claim in his own.1 In Taliaferro's case, Judge ROANE referred to a statute of Virginia, but shows from Blackstone that the wife's property must be reduced into possession quasi husband. The property of the wife must be administered upon, and all administrators must distribute for the benefit of creditors and legatees; but here the husband has no right, under our statute, to the administration of the property in question; that right died with her.2

¹ 2 Call, 389–393.

Rights of Mar. Wom. 11, 12; 4 Bac

² 1 Black. Com. 880, 899; Clancy, Abr. 446; Toll. Ex. 220.

McClung, for defendant in error. All the English statutes read do not alter the common law so that it applies here. statute of 29 Charles II. chap. 2, called the statute of distribution, was partly remedial, and did not change the common law. It was intended to give the husband the means of getting possession; but it is immaterial how he gets possession, if it be not tortiously. That possession we have now, and we are not seeking a remedy; we have the property, and we want no remedy. But the opposite party do, to dispossess us. In Whitaker v. Whitaker,² the common-law principle is laid down. York statute is similar to that of 29 Charles, and the principle decided is that it is immaterial how he gets possession, if it be not obtained tortiously. A case in 2 Connecticut Reports⁸ sustains the same doctrine. It is, then, immaterial whether distribution be made or not; he has a chose in action in pos-If distribution had been made, it would have been It is not of a third of the property to him, in right of his wife. The law the same as if she had been entitled to a devise. devises this to her, and her assent was not necessary; and the possession of herself and husband conjointly made it complete. The property has all along been in possession of Clifton, of which he was by law entitled to a third; that third is now in his possession; he has only to retain.

Hopkins, in conclusion. It is very true that Clifton is in possession of the whole estate, but his possession is undefiled; it is true the law gives the wife a third, but it does not identify what particular slaves she shall have; the County Court must do that. In the case cited from 6 Johnson, the right was sustained on the statute alone; and the case from Connecticut went upon a distinction in the English books quite different from ours. There the husband can recover property accruing to his wife during coverture, in his own name, without joining his wife; a distinction which has not been recognized in Virginia, where he must join his wife as here; and, as he cannot now do that, his right is gone. When the wife dies, her property is to be administered in the same manner as that of other women. Clifton has no right to the administration of her property, as

¹ Clancy on Mar. Wom. 111.

² 6 Johns. 112–119.

⁸ Page 564.

^{4 2} P. Wms. 187-139; 2 Com. Dig.

[&]quot;Baron & Feme," E. 8; Coke, Litt.

³⁵¹ a.

administratrix of a former husband; and it must be distributed as the property of other persons to her children.

By Lipscomb, C. J. If Clifton had died, his wife living, would her share of her first husband's property, under the circumstances stated, have survived to her, or would it have gone to the personal representatives of her last husband? I have stated the proposition in this way, for the purpose of testing the character of the possession held by the defendant of the property in which his wife had an interest to a certain extent, being undivided, and not separated from the rights of her children. believe the case of Johnson, Administrator of Ramsey, v. Wren,1 would furnish quite a satisfactory answer. In that case, Ramsey had intermarried with the wife of the defendant, and she, at the time of the marriage, was the legal owner of the slaves sued for; but she was not in possession. She had hired them for a term of years to her brother, with whom she lived; and Ramsey was the overseer of her brother, and had charge of the slaves as overseer. He died shortly after his marriage, and before the term for which the slaves had been hired had expired, without having exercised any other control than that of overseer over them; the same station he occupied before and at the time of his marriage. This Court, on the authority of Wallace et ux. v. Taliaferro et ux., 2 and several other cases equally in point, after much deliberation, ruled that Ramsey had never had the possession of the slaves as husband, but, up to the time of his death, his possession had been as overseer, and not as owner; and that at his death the right of his wife had survived to her, and that it did not go to his personal representatives. The case of Wallace et ux. v. Taliaferro et ux., reported in Call, was decisive. husband, in conjunction with his executor, had held possession of the personal property bequeathed to his wife, and it was ruled that his possession was as executor, and not as husband. case of Baker v. Hall⁸ is as strong. Hall, being an executor and trustee of the will of Gregory Wright, married Elizabeth Baker, one of the residuary legatees, and had possession of her personal property, and disposed of some of it, and died, leaving his wife. The question was, whether his possession was such as would transmit his wife's property at his death to his personal representative, or did the property remain in action and survive

¹ 3 Stew. 172.

² 2 Call, 447.

to the wife? The Master of the Rolls said that the husband must be considered as having entered into possession as executor and trustee, and not as husband. Both these cases conclusively sustain the position, that the possession must be clearly and unequivocally as husband, and not in any other right. And they present so striking an analogy in all their features to the case under consideration, that we are brought irresistibly to the conclusion that, whatever kind of possession Clifton had, it was as administrator in right of his wife, and not as husband and owner; and, had he died, his wife living, there could have been no doubt that the right to her share of her first husband's property would have survived to her, and not have gone to the Our statute of personal representatives of her last husband. distribution had given her one third of her deceased husband's property, but it had not designated the particular property comprising that one third; and, until it had been set apart to her as a distributee, her share as well as the shares of her two children were in action, and not in possession. Clancy, in his excellent treatise on the Rights of Married Women, when discussing the rights of the wife as survivor, lays down the rule to be thus: that "whenever the husband may bring suit either jointly or in his own name, at his election, the action would survive to the But, if he is compelled to sue in his own name separately, the action goes to his personal representative." And the case is put, by the same author, of a suit having been brought in trover by husband and wife jointly, for a chattel lost by the wife dum sola, and converted after coverture. After verdict, on a motion in arrest of judgment, on the ground that the suit should have been in the name of the husband alone, the judges were equally divided. But, in a subsequent case, the Court were unanimous that the suit might be brought either in their joint names or in the name of the husband alone. All the right that Clifton could exercise over the property of the estate of Murphy was exerted as administrator in right of his wife, and his possession of her individual share was not as husband, but as administrator. If it had become necessary to sue for any of it in consequence of its having been lost, he could not have sustained the action in his own name; but he would have been compelled to have brought the suit in the joint names of himself and wife.

¹ Pages 8 and 9.

It is contended, in support of the order of the judge of the County Court, that although the husband had never reduced his wife's share of the estate into his possession quasi husband, yet that he is entitled to sue for it as her representative, by the rule of the common law. This is not believed to be the correct rule. In the early period of English history, little regard was paid to chattel interests, and it was a long time before the personal property of an intestate became the subject of legislation. was not considered of much value, the great source of revenue and wealth in those times growing out of those feudal tenures, the little personal property that a man died possessed of, if he made no disposition of it by will, went either to his lord paramount or to the church, to be disposed of for the good of his soul in pious purposes. So long as a blind submission and confidence prevailed as to the power of the clergy in this life, and in the efficacy of their prayers in redeeming the souls of the departed, no serious objection was made to this mode of disposing of the personal property. Indeed, it would have had but little effect, and would have been looked on in those times as heinous impiety in the surviving relatives to attempt to divert the personal property of the deceased to any other purpose. The separation of the chattel from the possession of the owner was then, too, a case of very rare occurrence. But, as commerce increased, personal property became an object of much greater importance; it then composed in many instances the mass of very large fortunes. The public mind had somewhat shaken off the influence of religious superstition. The statute of 31 Edward III. was the first step in a system of legislation that finally resulted in the statute of distribution of 29 Charles II., securing to the relations of an intestate the enjoyment of the personal property. We have no authority for believing that, prior to that statute, any exception was made by the canons of the church, or by the rules of the common law, in favor of the husband who had not reduced his wife's personal property into possession during coverture. must, however, be admitted, that elementary authors have not treated the subject with very minute care. But whoever held the administration, whether he was the lord paramount or the prebendary of the church, held the personal property, after the administration, to his own use. The language of Mr. Clancy is, "that since the statute of 31 Edward III., chapter 11, by which

it is enacted, 'that, in case where a man dieth intestate, the ordinaries shall depute the next and most lawful friends of the deceased person intestate to administer his goods;' it has been held that administration of the wife's goods belongs of right to the husband; and as, by the statute of distributions, it is provided that nothing contained in it shall be construed to extend to estates of femes covert that shall die intestate, but that their husbands may demand and have administration of the rights and credits and other personal estates, and recover and enjoy the same, as they might have done by law before the making of this act, — it follows that the husband is now entitled, for his own benefit, to the chattels real of his deceased wife, and to all things in action, trust, and every other personal property, whether actually vested in him and reduced into possession, or contingent, or recoverable only by action or suit." From this quotation, it is very clear that the learned author considered the right as given by the statute of Edward III., and confirmed by the statute of distribution; if it had been otherwise, he would not have given the enactment of the first statute as the period of time when this rule first prevailed, that the husband should succeed to the choses and chattels in action of his deceased wife. Before the statute of distribution, as I have before remarked, all the personal property of the intestate vested in the person to whom administration was granted, and the statute of the 31 of Edward III. had previously directed to whom the ordinaries should grant the administration. The exception in favor of the husband in the distribution of his deceased wife's property not reduced to actual possession relates to the previous statute, and not to the common law. Many of the profession have, I doubt not, formed an erroneous opinion of the origin of the husband's right, by not attending sufficiently to the meaning of the expression, "as he might by law have done," used as the exception to the statute of distribution. If this exception had not been made, the wife's personal property in action, at her death, would have been distributed to her relatives, and would have defeated the construction that the Courts had given the statute of Edward III. With due deference to the great learning of Judge Spencer, it seems to me, that, in the case in 6 Johnson he did not attend to the true origin of the husband's right to succeed, on the death of his wife, to her personal property in action; if he had done so, he never could have

ascribed to it a common-law origin. He has fallen the more readily into this error, from the circumstance of the statute of the 29 Charles II. being in force in New York; none of the English statutes are in force in this State, and our own statute of distribution essentially differs from theirs. If it was therefore admitted, that, under our own statute, the husband would be entitled to the administration, it would not, as in England, confer on him a right to the property, but it would be distributed to the nearest kin in equal degrees. If the husband has incurred and paid debts contracted by his wife dum sola, it is his misfortune that he did not, whilst it was in his power, reduce her personal property into possession. I am not prepared to say, that, in such a case, he would be wholly remediless. It is possible that he could find relief by resorting to a Court of Chancery. I incline to the opinion that chancery would charge the property of the wife not in possession during coverture to the extent of her debts dum sola paid by her husband during coverture, if there was a deficiency of propetry in possession to reimburse the husband. We are not, however, called on to decide this question. We are of opinion that the possession of Clifton, the defendant in this case, was as administrator, and that he is not entitled to the share that his deceased wife would have received if the distribution had been made during her life. The order and judgment of the County Court must therefore be reversed, and the cause remanded.

Decree reversed and remanded.

HOWARD v. BRYANT.

(9 Gray, 239. Supreme Judicial Court of Massachusetts, 1857.)

Chose in action reduced to Possession by receiving something else than that due by its Terms.

ACTION OF CONTRACT to recover a legacy given to the plaintiff, when sole, by her father's will, in these terms: "I give to my daughter, Sarah W. Bryant, one hundred and fifty dollars, seventy-five dollars to be paid to her by my son, Ebenezer

Bryant, when he arrives at the age of twenty-two years, and seventy-five dollars more at the decease of my said wife."

The defendant was named in the will as principal devisee and residuary legatee, subject to a life-estate in the testator's widow, who died before this suit was brought. The plaintiff married John Howard in 1808. The defendant arrived at the age of twenty-two in 1809, and, in 1813, conveyed all the estate so devised and bequeathed to him to John Howard, by quitclaim deed, in the usual form, and containing, after the description of the premises, these words: "And it is considered that the said John Howard is to pay all the legacies which I am bound to pay by my father's will." Howard died intestate in 1824, and the plaintiff was appointed administratrix of his estate, and demanded payment of the legacy before bringing this action. The parties submitted the above case to the judgment of the Court.

- A. V. Lynde, for the plaintiff, cited Legg v. Legg, 8 Mass. 99; Hayward v. Hayward, 20 Pick. 526, 530; Daniels v. Richardson, 22 Pick. 570; 1 Dane, Abr. 342-344; Brotherow v. Hood, Comyn, 725; 1 Bright on Hus. & Wife, 37.
- J. P. Converse, for the defendant, cited Commonwealth v. Manley, 12 Pick. 173; Tuttle v. Fowler, 22 Conn. 58; Bates v. Dandy, 2 Atk. 207; Reese v. Keith, 11 Sim. 388; Doswell v. Earle, 12 Ves. 473; Bosvil v. Brander, 1 P. Wms. 458; Clancy on Hus. & Wife (Amer. ed.), 138, 139.

METCALF, J. The legacy given to the plaintiff by her father did not, on her marriage, vest absolutely in her husband. It was a chose in action which survived to her on his death, unless he had reduced it to possession, or released it, or had made a valid assignment of it, or had, in some other way, legally barred her right to it. And any lawful exercise of an act of ownership, by a husband, over his wife's chose in action, by which he appropriates it to his sole use, is such a reduction of it to possession as bars her right of survivorship. In this case, the legal effect of the facts is, that the plaintiff's husband received the amount of her legacy, by applying it towards payment for the land which he purchased of her father's residuary devisee, and in which she became entitled to dower.

Plaintiff nonsuit.

HONNER v. MORTON.

(3 Russ. 65. High Court of Chancery, 1828.)

Assignment of Wife's Remainder in Chattel Interests; Survivorship; Confirmation by Wife of Husband's Assignment.

Anthony Calvert, by his will, dated in November, 1808, bequeathed the residue of his estate to trustees, upon trust to invest a certain share of it in the public funds or on real securities, and to pay one half of the interest or dividends to Eleanor Torrie for her life, and the other half to Susannah Brewer during her life; and he directed that, after the death of the tenants for life, respectively, the trustees should transfer the principal moneys and funds, in equal shares, to the two daughters of Eleanor Torrie, then living. The testator died in the following December; and a sum of 14,395l. three per cent consolidated bank annuities was placed in the name of the trustees, as that part of his residue in which Eleanor Torrie and Susannah Brewer were interested. Eleanor Torrie, the tenant for life of one moiety of the fund, had two daughters at the date of the She died on the 1st of April, 1824. Mrs. Brewer, the will. tenant for life of the other moiety of the fund, was still living.

The plaintiff, one of the two daughters of Eleanor Torrie, was, at the date of the will, and at the death of the testator, the wife of John Honner; and he died in January, 1817, before his wife's reversionary interest fell into possession.

During the coverture, Mr. and Mrs. Honner executed indentures, dated in March, 1814, November, 1814, January, 1816, and November, 1816, by which they assigned, for valuable consideration, to different purchasers, various portions of the trust fund to which Mrs. Honner would be entitled on the death of her mother and Mrs. Brewer.

The assignment of November, 1816, was made to one Streater. Mrs. Honner, after the death of her husband, agreed to sell to Streater a further portion of the fund; and this agreement was carried into effect by an indenture, dated in November, 1817, which was indersed on the assignment of November, 1816.

This indorsed deed was made between Mrs. Honner, of the one part, and Streater, of the other part; it recited that Streater was entitled, under the within written indenture, to a certain portion of the fund, and referred to the other assignments; and it purported to transfer the property to Streater, subject to these assignments.

On the 4th of May, 1824, Mrs. Honner filed her bill, insisting that the assignments made while her husband and the tenant for life were both alive did not bind her, and praying that her portion of the fund might be transferred to her.

The principal question was the same as arose in Purdew v. Jackson, namely, whether, when a husband and wife have assigned to a purchaser, for valuable consideration, an ascertained fund in which the wife has a vested reversionary interest, expectant on the death of a tenant for life, and the wife and the tenant for life both outlive the husband, the wife is entitled, by right of survivorship, to claim the whole of the fund against such particular assignee for valuable consideration?

No authorities and doctrines were referred to by the counsel on either side, which were not mentioned in the argument of Purdew v. Jackson, except Lee v. Muggeridge.² The assignees of the fund contended that, even if the principal question should be decided against them, the wife was bound by acquiescence, having suffered more than seven years to elapse after the death of her husband without questioning the validity of the instrument; and they further insisted that the deed of November, 1817, executed by the plaintiff when she was a feme sole, would operate as a confirmation of the prior assignments to which it purported to be subject, or, at least, of the assignment of November, 1816.

To this it was answered, that it was not incumbent on the plaintiff to assert her right till the fund fell into possession. As to the deed of November, 1817, it could not give validity to instruments which were not previously binding on her; because there was no intention, in any of the parties, that it should operate as a confirmation. A purpose of confirmation would have been manifested by express words of confirmation. The assignments of 1814 and 1816 were, at that time, believed to be

¹ After the decision in Purdew v. ² 5 Taunt. 36. Jackson, 1 Russ. 1.

valid; and, on this notion, it was very natural that they should be mentioned in the assignment which the wife executed after her husband's death. It could not give any validity even to the prior deed of Streater himself; still less could it operate as a confirmation of the deeds of persons who were not parties to it.

Mr. Shadwell, for the plaintiff.

Mr. Horne and Mr. Coombe, for Streater.

Mr. Sugden and Mr. Girdleston, Jr., for some of the assignees of the fund.

Mr. Lovat and Mr. Garratt, for others of the assignees.

The Lord Chancellor. This fund was a chose in action of the wife; it was her reversionary chose in action. Whether the husband has the power of assigning his wife's reversionary interest in a chose in action, is a question which has been repeatedly agitated, and has excited considerable interest both at law and in equity. At law, the choses in action of the wife belong to the husband, if he reduces them into possession; if he does not reduce them into possession, and dies before his wife, they survive When the husband, assigns the chose in action of his to her. wife, one would suppose, on the first impression, that the assignee would not be in a better situation than the assignor; and that he, too, must take some steps to reduce the subject into possession, in order to make his title good against the wife surviving. But equity considers the assignment by the husband as amounting to an agreement that he will reduce the property into possession; it likewise considers what a party agrees to do as actually done; and therefore, where the husband has the power of reducing the property into possession, his assignment of the chose in action of the wife will be regarded as a reduction of it into possession. 1 On the other hand, I should also infer, that, where the husband has not the power of reducing the chose in action into possession, his assignment does not transfer the property, till, by subsequent events, he comes into the situation of being

309; Arrington v. Yarborough, 1 Jones, Eq. (post), and notes; 3 Lead. Cases in Eq. *660 et seq. See, however, Browning v. Headley, 2 Rob. (Va.) 370; Matheney v. Guess, 2 Hill, Ch. 63; Schouler's Dom. Rel. 125, and cases cited.

This dictum that equity considers the assignment as an agreement to reduce the property into possession, has been since repudiated. See Ashby v. Ashby, 1 Collyer, Ch. 554, citing Elwin v. Williams, 12 Law J. Ch. 440; 7 Jur. 337; Ellison v. Elwin, 13 Sim.

able to reduce the property into possession; and then his previous assignment will operate on his actual situation, and the property will be transferred. Such are the views which would occur to the mind, if there were no cases or authorities on the subject. But the question has frequently been under the consideration of Courts; and it is material to consider what the authorities are, both on the one side and on the other.

Sir William Grant, in Mitford v. Mitford, referring to an opinion which had been entertained in the profession, that the husband's assignment, for valuable consideration, of the wife's chose in action, passed an absolute right to the property, freed from the wife's contingent right by survivorship, seems to have intimated a strong doubt of its soundness. "If such be the rule," says he, "it is the favor a Court of equity shows to such a purchaser that operates, as in many cases it does, to put him in a better situation than the party from whom he derives his title." In White v. St. Barbe, he has said, in distinct terms, that "a husband can dispose of such property of his wife in expectancy against every one but the wife surviving; thereby intimating his opinion, that against the wife surviving the husband's assignment would not operate.

Thus stood the question when Hornsby v. Lee ⁸ came before the Court. In that case the question was argued on both sides; and Sir Thomas Plumer decided that the husband's assignment of the wife's reversionary interest was not valid against her surviving. It is true that it was a contingent interest which was there assigned; but the decision did not at all turn on that particular circumstance.

The case of Hornsby v. Lee excited considerable inquiry in the profession; and it was discussed very much at length in Mr. Roper's book on the Law of Husband and Wife. After the attention of the Court had been directed to that decision, the question came again before the same judge in Purdew v. Jackson.⁴ The point was clearly and distinctly raised. It was argued with great learning and ability on both sides, and particularly on the side adverse to the opinion of the Master of the Rolls. After the first argument, the importance of the question, and the doubts which had been entertained with respect to it,

^{1 9} Ves. 99.

⁸ 2 Mad. 16.

² 1 Ves. & Beames, 405.

^{4 1} Russell, 1.

again by one counsel on each side, and the Master of the Rolls took time to consider of his judgment. At length he delivered a most elaborate judgment; and, after going through every part of the question, came to a conclusion consistent with his opinion in Hornsby v. Lee,—that the husband could not assign the reversionary interest of his wife in a personal chattel, so as to bind her if she survived him.

Thus stand the cases in point, and the direct authorities on the one side. These decisions are consistent with the principle to which I have adverted. They support that principle, and are founded on it; and I should feel myself bound by those authorities supporting a principle in which I concur, unless I found them overborne by a superior weight of authorities on the other side.

It is not my intention to go through all the authorities that have been referred to as contradicting the conclusion to which Sir Thomas Plumer came: I shall satisfy myself with adverting to two or three of them, which have been most relied on.

Dawbury v. Atkins 1 was cited at first with much confidence, but appears ultimately to have been given up. The decree in that cause was, in one respect, clearly erroneous: and the Court seems to have considered the legacy, though charged on a reversion, as a present gift; for interest was allowed on it from the death of the testator.

In Grey v. Kentish² the decision was in favor of the wife; and therefore, so far as relates to the decree, that case is not an authority against the wife's right by survivorship. But it is cited on account of a dictum which occurs in the report of the judgment. There Lord Hardwicke is represented as stating, distinctly and in terms, "a husband cannot assign in law a possibility of the wife, nor a possibility of his own; but this Court will, notwithstanding, support such an assignment for a valuable consideration." In the first place, this is a mere dictum, and was not essential to the decision of the case. It is also to be observed, that the case is most inaccurately reported. As stated in Atkins, it is unintelligible; and it is only by attending to the correction of it in a note by Mr. Cox, that we are able to ascertain what the true facts were. I mention this circumstance for

the purpose of showing that in Grey v. Kentish not much reliance can be placed on the accuracy of the reporter.

In Bates v. Danby 1 the decision was against the wife; but then no doubt could be entertained as to the husband's power over the property, which was the subject of assignment there; and the application of that case, also, to the present question rests not on the decree, but on a dictum wholly unnecessary for the decision of the actual points which were before the Court "The husband," so says the report, "may assign the wife's chose in action or a possibility that the wife is entitled to, as well as her term, so that it be not voluntary but for a valuable consideration; but, though he cannot dispose of her shose in action without a valuable consideration, yet he may release the wife's bond without receiving any part of the money." Here is the opinion of a very learned judge, not essential to the decision of the particular case, conformable to an opinion said to have been expressed by him in another case, where also it was not essential to the decision.

But in considering what weight these dicta are entitled to, it is material to consider whether the same judge has ever expressed an opinion tending a contrary way. In Bush v. Dalway,2 if the husband had died in the father's lifetime, the same question might The actual state of circumstances have arisen as exists here. in Bush v. Dalway was that the father died first, and then the husband; the husband, upon the death of the father, had a right to the money which was in question; and it was upon the ground of the death of the father in the husband's lifetime that the wife was considered as bound by the covenant of the husband to assign the fund. Lord HARDWICKE says: "Perhaps the event might have happened in which she would not be bound, as if the right of action never had vested in the husband, but here it did by his surviving the father. A question was made whether the husband. had a right to assign it in his father's life, which is not necessary here, although I think he might not. Here," continues he, "before the father's death he had no right of action at all; but, afterwards, he might have called for it immediately, which the wife could not have otherwise prevented than by a bill for performance of the covenant."8 The learned judge here says

¹ 2 Atk. 208; 1 Russell, 33.

⁸ 1 Ves. Sen. 20.

² 1 Ves. Sen. 19; 3 Atk. 580.

(though not in very strong language), that an event might have happened in which the wife would not have been bound by the husband's covenant to assign her possibility, namely, if he had died before the father, and that the husband could not assign the possibility during her father's life. The point, indeed, was not necessary for the decision of that particular case; still, the opinion expressed by Lord Hardwicks on that occasion is at variance with the other dicta I have referred to: and when we are considering to what degree of respect the language so attributed to that learned judge is entitled, we are justified in setting the one dictum against the other. The proposition cited from Grey v. Kentish and Bates v. Danby might have been intended to be qualified in a variety of modes. What is the ground on which in Bush v. Dalway he puts the power of the husband to assign the chose in action of the wife? On the power of the husband to reduce the chose in action into possession.

If he had not had the power to reduce it into possession, his assignment or covenant to assign would not have operated; until the power of reducing the fund into possession vested in him by the death of the father, his covenant did not operate against the The same case is reported in Atkins; but the opinion is not expressed in terms quite so strong. According to that report, Lord Hardwicke expresses himself thus: "I cannot say but there might have been an event which would have given it to the wife, viz., if her husband had died in the lifetime of the But the death of the father happening in the lifetime of the defendant's husband alters the case. I am not obliged to give any opinion, as the husband has not assigned this contingency of the wife's; but I am rather inclined to think the husband would not have had a right to assign it. It has been frequently determined," he adds, "that a husband may assign a wife's chose in action for valuable consideration. But what does that turn upon? Why, the husband's right to sell. band here survived the father, so that he had a right to call upon the representatives of the father or the trustees to raise it." 1 this passage, I apprehend, the word "sell" is a misprint for "sue;" and to make the report of the judgment consistent with that in Vesey, we must read, "the husband's right to sue," instead of "the husband's right to sell."

From the judgment of Lord Hardwicke, in Ives v. Medcalfe, an opinion may be inferred similar to that which he expressed in Bush v. Dalway.

Hawkins v. Obyn² has been referred to as an authority in support of the husband's assignment; and undoubtedly Lord HARDWICKE is represented as having there expressed himself in terms corresponding to what he is stated to have said in Grey v. Kentish and Bates v. Danby. In that case the testatrix bequeathed 2,000l. to her son and daughter (who were husband and wife), to be enjoyed by them or the survivor of them. wife might have been the survivor, and her interest was a possi-Alluding to this interest, Lord HARDWICKE says: 3 "It has been insisted, too, in order to make this fall within the proviso, that the husband's disposition in his lifetime would have bound the wife, notwithstanding she had survived him; and if not good in law, yet it would have been in equity. I will not say but the husband might have disposed of this property in equity, if assigned for a valuable consideration; but then that must have been upon an actual assignment of this particular thing." That position, in reference to the particular circumstances of the case, cannot be sustained consistently with any of the authorities: for the event in which the wife would have become entitled never could have happened during the lifetime of the husband; and it is clear from all the authorities, that, if the possibility cannot happen during the coverture, the assignment of the husband does not operate upon it.

In the Duke of Chandos v. Talbot, the wife had attained the age of twenty-five when the question came before the Court, and the husband had a complete control over the property in dispute. Theobald v. Duffuy has no bearing on the subject. It was decided on the ground that the wife had joined, and joined with the consent of her friends, in assigning a term. It is mentioned by Lord Hardwicke, in one of the cases I have referred to (Bush v. Dalway), and he states what the ground of decision was.

Thus it appears that there is no one distinct decision at variance with the judgment of Sir Thomas Plumer; and, if some dicta can be cited against it, these are opposed by conflicting dicta. Therefore, when I consider the principle which I origi-

^{1 1} Atk., 63.

³ 2 Atk. 551.

⁵ 9 Mod. 102.

² 2 Atk. 549.

^{4 1} P. Wms. 602.

⁶ 1 Ves. Sen. 20.

nally laid down, that, where a husband assigns an interest belonging to his wife, and thereby agrees to do everything in his power to make that assignment effectual, the assignment will be valid against the wife only in those cases in which he is able to reduce the thing into possession, — when I further find that principle supported by the opinions expressed by Sir William Grant, and by two distinct decisions of Sir Thomas Plumer, and when I find on the other side no opposing decisions, — I confess I revert to my original opinion (the opinion which I should have pronounced if the subject had been untouched by authority), that the husband has no power to give effect to a conveyance of property of this description, unless circumstances so turn out as to have put him in a situation which enabled him to have reduced the chose in action into possession. If, at the time of the assignment, he is in a condition to reduce the chose in action into possession, the assignment operates immediately; if he is afterwards in a condition to reduce the thing into possession, the assignment will then have full effect; but if he dies before the event happens on which the chose in action may be reduced into possession, the assignment becomes altogether inoperative.

In the argument, a class of cases were referred to, which related to the taking of the wife's consent in Court. Her consent is taken to bar her equity where the husband has a right at law; and attempts have been made to have her consent taken with a . view to affect her expectancy. In Woodlands v. Crowcher (a case of that kind), Sir WILLIAM GRANT says:1 "In this instance the object is not to bar her equity to have a settlement, but to bar the right to survivorship; for upon his death it belongs to her entirely: she is giving up not her equity only, but her entire right by survivorship. That is not the case in which the Court takes her consent. If the husband has a right to convey, let him exercise his right. But why this Court should join and aid him for that purpose, I do not know." He thus intimates a strong opinion as to what he considered to be the extent of the right and power of the husband over the reversionary interest of the wife. It is true in that case he afterwards took the consent of the wife; but it was taken only de bene esse, so as not to prejudice the question in the event of her being the survivor.

In the two cases before Lord ALVANLEY, which are mentioned in Woodlands v. Crowcher, the consent of the wife seems to have been taken; but we know nothing of what was said before that judge, so that no reliance can be placed on them. Neither can any reliance be placed on Howard v. Damiani, which was a mere order by consent. I pass entirely over Mitford v. Mitford,2 and other cases in which the assignments were under a commission of bankruptcy. Sir WILLIAM GRANT, in giving his decisions in Mitford v. Mitford, expressly drew the distinction between the particular assignee and a general assignee: and he drew it for the purpose of obviating difficulties in the way of the case, difficulties which he did not think it necessary to combat. If he founded his conclusion in taking that distinction, it would not be very legitimate reasoning to adduce his decision in that case in support of the judgment of Sir Thomas Plumer. In Gayer v. Wilkinson, 8 Lord BATHURST took the same distinction for the same obvious reason. I therefore leave those cases entirely out of my consideration.

It is said that the husband may release the possibility of the wife; and reference is made to the dictum of Lord Holt, in Gage v. Acton, "that, when the wife has any right or duty, which by possibility may happen to accrue during the marriage, the husband may by release discharge it." Whether that dictum be or be not accurately reported, I will not undertake to say; but in the judgment in which it occurs Lord Holt differed from the rest of the Court, and the decision was contrary to his opinion.

From the decision there was an appeal, which was afterwards abandoned. Lord Kenyon, when the case was cited before him, pronounced the opinion there delivered by Lord Holt to be "as repugnant to the rules of law as of equity." Lord Holt, according to the report in Raymond, cites Lampet's case; but Lampet's case does not support the position in the unqualified way in which he states it. Suppose the husband could release the wife's possibility at law, I do not see how it follows that he can, therefore, assign it in equity. Admit the position that he can release it at law to be incontrovertible, he cannot make his own title perfect, unless he reduces it into possession. Why, therefore,

¹ 2 Jac. & Walk. 458.

^{4 1} Salk. 827 (ante, p. 245).

⁹ Ves. 87.

⁵ 4 T. R. 385.

^{* 1} Bro. C. C. 50.

should he be able to assign it in equity, and give another a title which he has not himself?

After considering the question in all its bearings, and the authorities and principles on the one side and on the other, these are the reasons which lead me to the conclusion that the judgment of the Master of the Rolls in Purdew v. Jackson was right, and that the husband, dying while the wife's interest continued reversionary, has no power to make an assignment of property of this description which shall be valid against the wife surviving.

There are other circumstances, independently of the general question, which have been alluded to in this case. It is alleged that there has been waiver and acquiescence on the part of the wife, because the suit was not instituted, and the assignments were not called in question, till more than seven years after the husband's death. But the tenant for life did not die till April, 1824, and the bill was filed in the following month. The wife was not called on to take any step till the death of the tenant for life.

The assignment to Streater, which the wife executed after her husband's death, refers to the former assignments, and is stated to be made subject to them; which, it is argued, amounts to a recognition and confirmation of these assignments. It would be too much to attribute such an effect to such recitals and such phrases; they were intended merely to state the order in which the assignments were to have priority.

I must declare that the four assignments made during the husband's lifetime cannot be sustained.

NEEDLES'S EXECUTOR v. NEEDLES.

(7 Ohio St. 432. Supreme Court of Ohio, 1857.)

Husband's release of his Wife's Expectancy of Inheritance. — Doctrine of Advancements considered.

RESERVED in the District Court of Franklin County.

This is a petition for an order of distribution of assets, in the hands of the petitioner, as executor of Philemon Needles, deceased.

The petition recites, that Philemon Needles, the testator, died April 6, 1851, leaving eight children: to wit, James Needles; Rachel, married to Thomas Needles; Anna, married to Littleton R. Gray; Amy, married to Jacob Swisher; Rebecca, married to George Daily; Enoch A. Needles; Lucinda, married to John Keys; and John A. Needles. That, on the 23d day of May, 1849, Philemon Needles made his last will and testament, whereby he gave certain specific legacies as follows, to wit: to his wife, a house and lot, \$1,500 in money, and some household furniture, &c.; to Rachel, \$5; to Anna, \$50; to Amy, \$50; to James, \$50; to John A., \$200; to Rebecca, \$200; to Lucinda, \$50; to his grandson, Enoch A., son of Enoch A., \$200; to the children of his daughter Anna, \$2,000; to the children of his daughter Amy, \$1,800; to the Methodist College in Delaware, \$100.

The testator then directs, that, if there be anything left after paying these legacies, then a sum not exceeding \$300 is to be paid to the children of his daughter Rebecca. And the will closes without any residuary clause.

The petition states also that the will has been admitted to probate; and that, after paying the debts of the estate, and the specific legacies, there is a surplus of about \$8,000 in the hands of the executors for further distribution. That Lucinda, wife of John Keys, George Daily, husband of Rebecca, and Littleton R. Gray, husband of Anna, all died before the death of the testator; and that Rebecca afterward married William Mitchell. The petition states further that, on the 13th of August, 1840, the

following instrument was executed and delivered to the testator in his lifetime, by John Keys, to wit:—

Received, of Philemon Needles, two thousand dollars, which I acknowledge is to be in full of all claims I could have against the estate of said Philemon Needles, after his death, as one of his heirs, hereby binding myself and my heirs not to set up any further claim. In witness whereof, I have hereunto set my hand and seal this 13th day of August, A.D. 1840.

JOHN KEYS. [L.s.]

Witness, Morris Fookes.

Also, another instrument in the same words, dated September 24, 1840, signed and sealed by Littleton W. Gray; also, another instrument, dated August 9, 1848, in the same words, signed and sealed by George Dailey and Rebecca Dailey; and also another instrument dated on the 21st of December, 1844, in the same words, excepting that the sum received is \$1,375, instead of \$2,000, signed and sealed by Thomas Needles and Rachel Needles; and the petitioner further states that, while, on behalf of the daughters whose husbands severally executed the said instruments in writing as aforesaid, it is claimed that an equal distribution with the other heirs-at-law of the decedent should be made in the said overplus not disposed of by the will, on the other hand, the four other children insist that the instruments in writing aforesaid are valid releases, and that, therefore, the daughters whose husbands executed them are thereby barred from any share in that part of the estate undisposed of by the Wherefore the petitioner prays the interference of the will. Court, and an order of distribution directing him as to his duty in the premises.

Swayne and Barber, for petitioner.

John W. Andrews and Henry Stanberry, for the children against whom releases are set up.

P. B. Wilcox, for the four children who claim the whole overplus.

Bartley, C. J. The first inquiry suggested by the facts of this case is, whether the several gifts or donations made by Philemon Needles to his four sons-in-law, for which he took the several receipts in question, can be treated as advancements under the statutory regulation on that subject in this State.

It was held in the case of Putnam's Adm'r v. The Heirs of Putnam, 18 Ohio, 347, that the former laws of this State regu-

lating descents and distributions of personal estates provided for advancements as to real, but not as to personal, property. And this construction, although stringent, and resulting in unjust and unequal distribution of estates, was affirmed by several decisions made afterwards. The difficulty was, however, removed by legislation; and the statute now in force applies the rule in relation to advancements to estates personal as well as real. Ohio Stat. Revised, 323, sec. 10. The provision, however, as to advancements applies only in case of intestacy. True it is, Philemon Needles died intestate as to the residuum of his estate now sought to be distributed. But it is apparent from the provisions of his will that he designed and manifestly supposed that he had made a disposition of his whole estate. He made bequests to all his children, severally, in various amounts, and even anticipated a supposed residuum of \$300 in his distribution. The several advancements which had been made to his four sons-in-law, for which he had taken their said receipts, must have been in his contemplation when he made his will. How much he had previously advanced to his other children does not appear in this case. But it is fair to presume, that, in view of all his previous advancements, he made such a distribution of his property by his will as he deemed just and proper. In such a case, therefore, although the testator had, unexpectedly and beyond his own anticipation, died intestate as to a residuum of his estate, the statutory provision as to advancements could have no just application; and whether it could apply to any case of partial intestacy, where the testator knowingly and designedly made a testamentary disposition of only a part of his property, it is not necessary to consider in this case.

It is insisted, however, that the interest in expectation, or hoped-for inheritance of the daughters, Rachel, Anna, Rebecca, and Lucinda, from their father's estate, was released by their several husbands by virtue of the instruments of writing executed by them respectively to the father, whereby each acknowledged the receipt of the advancement made, and agreed with the father not to set up any further claim against his estate, as one of his heirs after his decease. And this presents the question of the power of the husband to release the wife's bare possibility or expectation of inheritance from her ancestor.

One of the daughters, Lucinda, and two of the sons-in-law,

Dailey and Gray, died before the death of the ancestor, and, therefore, before any actual right or interest could have vested in the wife by inheritance. The wife of George Dailey and the wife of Thomas Needles, respectively, united with their husbands in signing the receipts. This, however, cannot affect the question or give any legal vitality to the instruments, if they had none without it. If the husband had the power to release, or by contract to bar this mere expectancy of the wife, it was by virtue of his right and control over his wife's personal estate, and not by means of the wife's consenting thereto. It may be that, in a disposition of, or an arrangement in regard to, a wife's property by the husband, made with a view to the wife's separate use or advantage, the consent of the wife might in a Court of equity be treated as a material element in the transaction. in the release or assignment of the wife's choses in action by the husband, for his own interest, the wife's uniting with the husband in the execution of the contract is a matter of no legal consequence whatsoever. In regard to the personal estate of the wife, not held in trust for her separate use, the husband represents the wife, exercises all her authority; and, indeed, in contemplation of law, the legal existence of the wife in that regard is merged in that of the husband. There is but one mode known to our law by which a married woman is authorized to join her husband in the execution of a contract, and that has reference to real estate, and is done under certain formalities and guards against marital influence prescribed by statute, not attempted to be followed in this case. It was held in Stamper v. Barker, 5 Mad. C. C. 157, that the wife could neither be barred of her right by survivorship to her reversionary interests, by her consent in Court in favor of her husband, nor could she upon separation from her husband bind herself by deed stipulating that he should have a certain part of her contingent property when it should fall into possession.

The wife's consent, even in Court, or her joining her husband in an assignment or deed for her reversionary interests, has been held ineffectual as to her right of survivorship in numerous cases. Hornsby v. Lee, 2 Mad. C. C. 16; Woollands v. Crowcher, 12 Ves. 174; Pickard v. Roberts, 3 Mad. C. C. 384; White v. St. Barbe, 1 Ves. & B. 405. It is by force of the statute in this State that the wife's interest in property is affected

at law by her joining in the execution of a conveyance. The inquiry in this case, therefore, involves the question of the extent of the power of disposal, by the husband, of the wife's contingent interest or mere expectancy. It appears to be well settled that the wife's contingent right by survivorship to her choses in action, immediately reducible into possession, may be barred by settlement before or after marriage, by actual reduction into possession, or certain acts held to be equivalent to actual reduction into possession, — such as the recovery of a judgment or decree in the sole name of the husband, the taking of a note or obligation for the debt in the sole name of the husband, by an assignment by the husband for a valuable consideration, or by It appears to have been held in England, at one time, release. that an assignment for a valuable consideration of the wife's choses in action, presently reducible into possession, would not defeat the right of the wife by survivorship, Burnett v. Kinaston, Freem. 241. But for a series of years past it appears to have been settled in that country that an assignment or release for a valuable consideration by the husband, of the wife's choses in action immediately reducible into possession, would bar her title by survivorship. Clancy's Husband & Wife, 150. the more recent English equity cases are wholly irreconcilable with the former decisions on the subject of the power of the husband to defeat, by assignment, the contingent right of the wife by survivorship to her reversionary interests, or choses in action not immediately reducible into possession. In Chandos v. Talbot, 2 P. Wms. 601; Bates v. Dandy, 2 Atk. 206; Hawkins v. Obyn, id. 549, it was held that the wife's reversionary or contingent interest, or the possibility of a term, or the specific possibility of the wife, may be released or assigned by the husband for a valuable consideration, so as to defeat her title by survivor-But a different doctrine was held to be law in Hornsby v. Lee, 2 Mad. C. C. 16; in Purdew v. Jackson, 1 Russell, 70; in Honner v. Morton, 3 id. 65; and in Mitford v. Mitford, 9 Ves. In the last-mentioned case, Sir WILLIAM GRANT disputed 87. the soundness of the rule, that the husband's assignment for a valuable consideration passed the wife's chose in action, freed from her contingent right of survivorship, upon the ground that in such case the purchaser would take a greater right than the husband had. In Hornsby v. Lee, Sir Thomas Plumer held that

the husband's right to the wife's choses in action was dependent on the contingency of his reducing them to possession during coverture; that a deed assigning a reversionary interest is not an actual reduction into possession, because it is impossible to reduce a reversionary interest into possession; and that it could not be a constructive reduction into possession, because its only effect is to place the assignee in the same situation as the assignor; that is, if the husband survive the wife, the assignee would retain the property; if, on the other hand, the wife survive while the interest continues reversionary, she is entitled to the property.

It is proper to observe that our attention is directed to the question of the wife's right of survivorship, and the extent of the husband's power of disposal to affect it by assignment or release. We have nothing to do at present with the question, which is of frequent occurrence in chancery cases, touching the extent to which the husband, by assignment of the wife's property, may affect what is termed the wife's equity to a suitable provision out of the property for the support of herself and her children. That is a subject wholly disconnected with the question now before us, and presents very different rules for consideration.

In the case of Purdew v. Jackson, above cited, where the question directly arose as to the power of the husband to bar the wife's right by survivorship to such reversionary interest, by an assignment for a valuable consideration, the authority of the decision in Hornsby v. Lee was strenuously denied; and the Master of the Rolls, in affirming his views expressed in the former case, after a patient hearing and searching investigation of the whole subject, said:—

"The law of marriage gives the wife's choses in action to the husband, on condition that he reduce them to possession during its continuance; if he die before his wife without having done so, she takes them by survivorship. How, then, his honor asks, can he bar her right of survivorship by an act which is not a reduction into possession, and that, too, at a time when it is impossible, from the nature of the reversionary chose in action, that it should be reduced into possession? That if it be said that her right may be barred by something short of reduction into possession, namely, an assignment for valuable consideration, we must alter the doctrine laid down in our books. It will no longer be true that the husband shall not have the chattels personal of the wife lying in action, unless he reduce them into possession during the mar-

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/ riage. That the effect of an assignment for a valuable consideration operates no otherwise than by putting the assignee in the place of the assignor; that the assignor cannot give to another a power which he himself does not possess; and that, therefore, where the wife has a chose in action which the husband himself cannot recover, he cannot assign over to another the right to reduce it into possession. That the husband's right is merely a right to obtain possession of the subject, when the period arrives at which the wife is entitled to the possession of it; and if he die in the mean time, leaving his wife surviving, his right is gone, and the right of the surviving wife takes effect. The assignee for valuable consideration must take the right as the husband himself had it; he buys the chance of the husband's outliving the wife, or of the reversionary chose in action falling into possession during coverture, and he must wait to see how the event turns out. That in this case the husband had died before the chose in action had been reduced into possession; the assignee had, therefore, lost all chance of recovering it, and the wife took it by her right of survivorship."

This doctrine was reaffirmed in Morley v. Wright, 11 Ves. 12; and also in Ellison v. Elwin, 13 Sim. 309. And again, in Honner v. Morton, above cited, Lord Chancellor Lyndhurst fully sustained this doctrine, which had been declared by the successive Masters of the Rolls, Lord ALVANLEY, Sir WILLIAM Grant, and Sir Thomas Plumer, as to the reversionary interest of the wife; and, in doing so, he took a distinction between a case where the husband had the power at the time of the assignment of reducing the chose in action or interest into immediate possession, and where he had not,—holding that, in the former case, the assignment ought in equity to be regarded as a constructive reduction of the property into possession; for as he had the power of reduction into possession and the assignment amounted to an agreement to do it, equity would regard that as being done which the party had agreed to do. This doctrine, however, so well supported by authority and by reason, and apparently resting on ground incontestable, was strenuously and & with laborious research controverted by Chief Justice Gibson in Tthe case of Siter and Another, guardians of Jordan, 4 Rawle, 468, wherein he contended that marriage worked not only a transfer to the husband of the wife's choses in action reduced to possession during coverture, but a transfer of the wife's dominion and power of disposal, so that whatever interest she might have assigned if a feme sole, the husband could assign or release for a valuable consideration; and that the distinction between vested and contingent or reversionary interests of the wife, in

respect to the marital dominion and power of transfer over it, made in the recent English cases, is without foundation. the extensive and critical reviews of the English cases by Chief Justice Gibson was not necessary to the decision of his case, and could only have been designed to expose a supposed erroneous theory in the English decisions, inasmuch as the authority of the case of Siter is to the effect only, and can go no further than, that the assignment of a wife's chose in action by her first husband to trustees for the benefit of the wife and children, and to place it beyond the power of waste by a subsequent husband, was meritorious and valid in equity. The views of Chief Justice Gibson on this subject, however, have been adopted in subsequent decisions in Pennsylvania, in which they were applicable, and reluctantly followed in the recent case of Webb's Appeal, 21 Penn. St. 248, wherein the remark is made in the opinion of the Court. "However averse to this conclusion some of us might be, if the question were an open one, we remember that our office is jus dicere, and not jus dare; and we bow to authorities which we are bound to respect."

This doctrine, however, appears to be peculiar to Pennsylvania. I have not been able to learn that it has been recognized in any well-considered case in either of the other States in this country. The case of Tuttle v. Fowler, 22 Conn., goes no further than to decide that the husband's assignment of the wife's chose in action capable of immediate reduction into possession, was substantially such a reduction into possession by the husband as to defeat the wife's right by survivorship.

The doctrine of the decisions in England above mentioned was recognized as law by the Court of Errors and Appeals in Mississippi in the case of Sale v. Saunders, 24 Miss. 25; and has been followed in numerous other cases in this country.

And the distinguished law writer, Mr. Clancy, in his treatise on the rights, duties, and liabilities of husband and wife, sustains the doctrine of the English decisions in relation to the wife's right of survivorship in her contingent or reversionary estate, and denies that the power of disposal by the husband, so as to bar the rights of the wife by an assignment for a valuable consideration, is absolute. The effect of the law upon this subject would seem to be, that the wife's dominion or power of disposal, which the husband by virtue of the marital relation

assumes over the wife's choses in action, consists not in his succession to the wife's right of property, but the power of control and management of her choses in action for the wife's benefit, together with the power of acquiring an absolute right of property in the same, so far as they are capable of reduction into possession.

There can be no ground for a distinction between the power of the husband to bar the wife's contingent right of survivorship by assignment, and that of doing the same thing by release. If the husband could not by assignment transfer to the assignee any greater interest than that which belonged to him, he certainly could not by release to the releasee. The reason which controls in the one case must prevail as to the other. And where the husband has not the power of disposal to affect the wife's right by survivorship by assignment, he could not affect it by release.

This view of the law is decisive of this case. The interests in expectancy of the four daughters of Philemon Needles, whose husbands executed the instruments in the petition mentioned, were not, of course, capable of reduction into possession at the time of the execution of the instruments, and were not, by either of the husbands, reduced into possession afterwards. And in the proceeding now pending, the claim to the inheritance is set up in behalf of each of the wives, and not of that of either of the husbands.

It has been urged in this case, that where a feme covert has a right which, by possibility, may happen during coverture, the husband may release it or covenant to release it for value, and bona fide, so as to bind the feme forever. And this raises the inquiry whether there was any right or interest which could have been the subject-matter of release at the time of the execution of the instruments in question. It has been said that, "where the wife hath any right or duty which by possibility may happen during the coverture, the husband may, by release, discharge it." Sheppard's Touchstone, 151. It is true, as a general thing, that all contingent and executory interests and contingent estates of inheritance, as well as springing and executory uses and possibilities coupled with an interest, are assignable and releasable. But it is also a general rule, that a naked or remote possibility cannot be released, for the reason that a release must be founded on a right in being, vested or

contingent. 8 Bacon's Abr. 280; Pellitrean v. Jackson, 11 Wend. 110. Where there is a present existing right, although to take effect in future, and even then only on a contingency, it may be released. 9 Johns. 123. But in case of a mere possibility, or a remote possibility, which is termed in law a possibility on a possibility (4 Kent, Com. 206), there is no right in being which can be the subject of release. "The word 'possibility,'" says Smith on Real and Personal Property, "has a general sense, in which it includes even executory interests, which are the objects of limitation. But, in its more specific sense, it is that kind of contingent benefit which is neither the object of a limitation, like an executory interest, nor is founded in any lost but recoverable seisin, like a right of entry. And what is termed a bare or mere possibility signifies nothing more than an expectancy, which is specifically applied to a mere hope of succession unfounded in any limitation, provision, trust, or legal act whatever; such as the hope which an heir, apparent or presumptive, has of succeeding to the ancestor's estate." Smith on Real and Personal Property, 192.

And it appears to be well settled, that a contingent interest of a person unascertained, or a mere possibility as distinguished from a contingent interest in a person who is ascertained, or the mere hope or chance of succession of an heir apparent, cannot be released. Sheppard's Touch. 322 and 328.

It is manifest, therefore, that at the time of the execution of the instruments in question, there was no right or interest in being which could have been the subject-matter of release. it is said that although such a release or assignment of the mere possibilities or expectancies of heirs apparent is wholly invalid at law, yet that a Court of Equity will regard it, and give effect to it, as a contract to release, when the interest becomes vested, and consequently that, when the interest does so become vested, the claim of the releasee will be enforced, not indeed as a trust, but as a right under a contract. Or, in other words, that the hope or chance of succession would be barred by estoppel. might be a sufficient answer to this to say that no claim is set up in this proceeding, in behalf of either of the husbands, to any interest in his wife's inheritance from her father's estate; and that the instruments in question, if regarded in equity as contracts to be enforced, must be treated as the contract solely of

each of the husbands, and as creating no estoppel against the But, for my own part, I feel no hesitation in questioning the validity of such a contract. What is the real character of the contract before us? Philemon Needles, in his lifetime, made certain advancements to four of his daughters, and took from the husband of each a receipt for the amount advanced, in which the husband acknowledged the same "to be in full of all claims he could have against the estate of said Philemon Needles, after his death, as one of his heirs," and stipulating for himself and his heirs "not to set up any further claim." Where is the mutuality either of consideration or of obligation for this agreement? The advancement was a voluntary act; and whether Philemon Needles should thereafter give any more of his property to these children depended on his own pleasure. He could, by his will, so distribute his property as to wholly deprive them of any further share in his estate; or he could, as he actually did subsequently choose to do, in the distribution of his property by will, give them a further share in his estate. The stipulation only conceded to Philemon Needles that which was an inherent legal right of his own in the disposition of his own property. The real nature of the contract was such as to impose no binding If Philemon Needles chose afterwards to make legal obligation. further donations to these children, this contract could not prevent their accepting it; and if he was disposed to give all the residue of his property to others, he had the legal right and full power so to do, without any such agreement.1... Ordered, that an equal distribution be made among all the heirs-at-law of Philemon Needles, deceased, of the residuum of his estate undisposed of by will.

Brinkerhoff, Bowen, and Scott, JJ., concurred. Swan, J., having been of counsel, did not sit.

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¹ The remainder of the opinion is foreign to the matters treated of in devoted to the discussion of a question this volume, and hence is omitted.

CAPLINGER v. SULLIVAN.

(2 Humph. 548. Supreme Court of Tennessee, 1841.)

Assignment of Wife's Remainder or Reversion in Chattels. — Survivorship.

This is an appeal in error from the Circuit Court of Smith County.

Burton, for the plaintiff in error, cited, 2 Johns. Ch. 208; 2 Story, 631; Clancy, 442; 2 Atk. 419; 10 Ves. 90; 2 Kent, 141; Clancy, 137-39; 1 & 2 Law Lib. 141-43; 12 Ves. 437; 2 Atk. 550; 2 Cruise, 271; 5 Johns. Ch. 202; 8 Cowen, 590; 1 Yerg. 413; 10 Yerg. 190.

Caruthers, for the defendant in error.

REESE, J. delivered the opinion of the Court.

This is an action of detinue for slaves. The property in question was bequeathed by the last will and testament of Boling Felts, to his wife for life, and after her death to Ann Sullivan, the plaintiff in this suit, then the wife of William Sullivan; and the said William was appointed executor of the will. He duly took upon himself that office, and, in 1819, purchased of Mary Felts, testator's widow, the property in question, for the sum of one hundred dollars per annum, to be paid to her during her life. In 1830, Mary Felts acknowledged in writing her reception of a sum in gross, from William Sullivan, in satisfaction of her annuity. Subsequently, in the same year, William Sullivan conveyed the slaves, for a valuable consideration, to Caplinger, the defendant, and put him in possession thereof, he himself having been possessed of them from the time of his purchase in 1819. William Sullivan died in 1835; Mary Felts, the owner of the slaves for life, and Ann Sullivan, the wife of Wiliam, to whom they were limited in remainder, surviving. Mary Felts died in These facts, in the Circuit Court, were found by the jury 1838. in a special verdict; and judgment thereon was pronounced by his honor the circuit judge in favor of Ann Sullivan, the plaintiff; and the defendant, Caplinger, has appealed in error to this Court.

Justice Story, in his Commentaries on Equity, paragraph 1413, states it as a principle, that "no assignment by the husband of reversionary choses in action, or other reversionary equitable interests of the wife, even with her consent and joining in the assignment, will exclude her right of survivorship." The assignment, he adds, "is not, and cannot from the nature of the thing amount to, a reduction into possession of such reversionary interest." The general principle thus laid down we find to be abundantly sustained by authority, and particularly by the leading cases on the subject, Purdew v. Jackson, 1 Russ. 1, determined by Sir Thomas Plumer, Master of the Rolls, and the case of Honner v. Morton, 3 Russ. 65, determined by Lord Chancellor LYNDHURST, 15th April, 1827. The point settled in the last case is, that, where husband and wife assign to a purchaser, for valuable consideration, a share of an ascertained fund in which the wife has a vested interest in remainder, expectant on the death of a tenant for life, and both the wife and tenant for life outlive the husband, the wife is entitled by right of survivorship to claim the whole of the share of the fund against such particular assignee for valuable consideration. The Lord Chancellor refers to the principal cases relied on on either side, and particularly to the case before Sir Thomas Plumer; and concludes, after considering the question in all its bearings, and the authorities and principles on the one side and on the other, that the judgment of the Master of the Rolls in Purdew v. Jackson was right, and that the husband, dying while the wife's interest continued reversionary, had no power to make an assignment of property of this description which shall be valid against the wife surviving.

But it is urged, on behalf of the defendant in this case, that the husband did not die while the wife's interest in the property continued reversionary; for it is said that the reversionary character of the interest was terminated by the purchase on the part of the husband from the tenant for life. But this we think is not so. For if after this purchase the husband had died without assignment, can it be doubted that the personal representative of the husband would have been entitled, during the existence of the tenant for life, to the property in question, and, after that, that the wife would have been entitled by survivorship?

The wife had no interest in the husband's purchase; he stood

in the place of tenant for life. The tenancy for life still continued; and the reversionary interest, unaffected by such purchase, could not commence in possession till the life-estate terminated. The husband possessed the slaves; but he possessed them as purchaser, not as husband, and his title and possession were of, and commensurate with the life-estate, and that only. Here was no merger of estates. The life-estate belonged to the husband solely and absolutely as purchaser; the reversionary interest or remainder, to husband and wife, in right of the wife, and liable to become his absolutely by survivorship. If the husband, having assigned, had continued to live till the lifetime estate had terminated, then, indeed, as a Court of Chancery views such assignment as an agreement to assign when in his power, and considers that also as done which ought to have been done, the assignee for a valuable consideration would, in equity, have been entitled to the property.

We have been referred by defendant's counsel to the case of Pinckard v. Smith & Wife, Littell's Select Cases, 331, as bearing on this question. The Court in that case seemed to be of opinion that a vested remainder in a slave accruing to the wife during coverture, so far vested in the husband as that he would be entitled to recover the same without administration on the wife's estate. But they also state it as their opinion, that it does not so vest as to defeat the wife of her right by survivorship. The case, whether properly determined or not, can therefore be no authority bearing upon the case at the bar.

Upon the whole, we are of opinion that the Circuit Court pronounced the proper judgment upon the special verdict, and we therefore affirm that judgment.

ARRINGTON v. YARBROUGH.

(1 Jones, Eq. 72. Supreme Court of North Carolina, 1853.)

Reduction of Wife's choses in action by Assignment; Survivorship.

CAUSE removed from the Court of equity, of Franklin County at Fall Term, 1853. The bill was filed by the plaintiff, as the administrator of Frederick Battle, alleging that certain questions were raised between his widow and her children and others claiming under them, that made it unsafe for him to distribute the estate. He alleges particularly that the distributive share to which his daughter Mary Ann would be entitled, was claimed by James S. Yarbrough, by virtue of an assignment of her late husband, Thomas E. Yarbrough, who had given him notice of his claim, and warned him not to pay the same to Mary Ann, but demanded the same for himself.

The bill also alleges that Thomas E. Yarbrough, and his wife, Mary Ann, had been advanced in certain slaves mentioned in the bill, in the lifetime of the intestate; and he prays the advice of the Court, and asks that the several parties may state their titles and interplead with each other, and litigate their opposing claims, to the end that justice may be done to each, and the plaintiff saved harmless in distributing the estate of his intestate, and that an account may be taken of his administration.

James S. Yarbrough and William H. Battle, administrator of Thomas E. Yarbrough; Mary Ann Yarbrough, widow of Thomas E. Yarbrough; Temperance Battle, the widow of Frederick Battle; and the rest of the children of Frederick Battle,—were made parties defendant. Subsequently to the commencement of the suit, Mary Ann Yarbrough intermarried with James C. Green, who was made a party defendant with his wife.

The answer of James S. Yarbrough states specifically, and at large, the nature and consideration of the assignment made to him by Thomas E. Yarbrough, and insists that it was bona fide and for value.

Mary Ann Yarbrough (now Green) admits the negroes put into possession of her former husband, Thomas E. Yarbrough, to have

been advancements, and submits that the estate of her father shall be allowed for the same, out of her share; also, that she and her husband were further advanced in cash, horses, cattle, and other articles of personal property, of which she states the value. She denies the equity of the claim set up by James S. Yarbrough, and says that it was either given as a security for a very small sum, or was obtained by fraud and imposition from her husband, or to act as a power of attorney; and, as to that not reduced to possession by her husband in his lifetime, she claims the same by survivorship, notwithstanding the assignment of her husband, the said Thomas E.

The answer of W. H. Battle, the administrator of Thomas E. Yarbrough, claims the unrealized part of Mary Ann's distributive share of her father's estate, in his representative character, and insists that the assignment thereof was intended as a mere authority to enable him to settle with the administrator of the father-in-law. He alleges that the negroes put in the possession of Thomas E. Yarbrough and his wife, though intended at first as advancements, were subsequently divested of that character, by being conveyed by deed to the children of Thomas and Mary Yarbrough (which deed is filed), and he insists that the distribution shall therefore take place, with such part subducted from the mass of Frederick Battle's estate.

The answer of Mrs. Temperance Battle, the widow of Frederick, explains this part of the transaction, and alleges it as intended to cover the property from the creditors of Thomas, and done at his instance and that of his wife Mary Ann, and insists that these negroes shall be treated as advancements, and accounted as part of their distributive share.

There was replication and commission, and much proof taken in the cause; but, as the view taken of the case renders the consideration of it unnecessary, it is for that reason omitted.

Moore, for plaintiff.

Miller, Lanier, and Winston, for defendants.

BATTLE, J. It is now a well-established principle of equity, that, if a married woman became entitled during her coverture to a legacy, or to a distributive share of an intestate's estate, and her husband die without having reduced it into possession, or done anything equivalent thereto, the wife will be entitled to it, and may recover it to her own use. Garforth v. Bradley, 2

Ves. Sen. 675; Carr v. Taylor, 10 Ves. Jr. 578; Schuyler v. Hoyle, 5 Johns. Ch. 196; Revel v. Revel, 2 Dev. & Bat. 272; Hardie v. Cotton, 1 Ired. Eq. 61; Poindexter v. Blackburn, id. 286; McBryde v. Choate, 2 Ired. Eq. 610; Rogers v. Bumpass, 4 Ired. Eq. 385; Weeks v. Weeks, 5 Ired. Eq. 111; Mardree v. Mardree, 9 Ired. 295. Should the legacy or distributive share not be paid or delivered over to the purchaser by the executor or administrator, he cannot recover it at law, either in his own name or in the names of himself and wife; but must proceed, in the names of himself and wife, by a bill in equity, or by a petition in a Court of law in the nature of a bill in equity, under the fifth section of the 64th chapter of the Revised Statutes, entitled, "An Act concerning filial portions, legacies, and distributive shares of intestates' estates." If the husband die, leaving his wife surviving after bill or petition filed, but before decree, the legacy or distributive share will survive to the wife. Simmons, 3 Atk. 21; Adams v. Lavender, 1 Mc. & Y. 41. it seems, would be the result if the husband died even after a decree, but before it was put in execution. Nanny v. Martin, 1 Eq. Cas. Abr. 68; McAulay v. Philips, 4 Ves. Jr. 15. Notwithstanding the opinion of Lord Thurlow to the contrary; Heygate v. Annesley, 3 Bro. Ch. Cas. 362. These authorities clearly show, that, upon the death of Thomas E. Yarbrough, the first husband of the defendant, Mrs. Green, her distributive share in the estate of her deceased father, Frederick Battle, survived to her, unless her right to it was defeated by the assignment under which the defendant James S. Yarbrough claims it.

A very important question arises, whether that assignment, supposing it to be bond fide and for a valuable consideration, did have that effect. We have considered the subject with much attention, and with an anxious desire to come to a correct conclusion upon it, and an examination of all the cases to which we have access has satisfied us, that in England it is now settled, upon principle and authority, that a husband cannot assign, even for value, a greater interest in his wife's equitable choses in action than he has himself; that is, the right to reduce them into possession during the husband's life, subject to the contingency of their surviving to her, should the assignee not have done so in the lifetime of the husband. We are aware that an impression has prevailed in this State that a different rule has been

established here. We are aware, further, that the impression alluded to has apparently the sanction of several dicta of our judges; but, as neither the industry of the counsel for the assignee, nor our own researches, have enabled us to find a single adjudicated case in opposition to the English rule, we feel ourselves not only at liberty but bound to adopt it, as being more just and better supported by principle than the one for which the counsel contends. In England, the nature and extent of the interest of the husband in his wife's equitable choses in action, and of his power of disposing of them, have for a long time occupied the attention of the Court of Chancery. At first, the subject did not seem to have been well understood even by the ablest equity judges, and hence we find among the earlier, and even among some of the later cases, conflicting dicta, as well as opposing decisions.

We do not deem it necessary to review the cases in detail, because it has been so recently and ably done by Mr. Bell, in his work on the Law of the Property of Husband and Wife, book 3, c. 2, § 3 (67 Law Lib. p. 62). The doctrine now established is well summed up by Mr. Adams, in his Doctrine of Equity, p. 142: "It has been contended that a husband's assignment of his wife's choses in action should exclude the wife's right by survivorship, on the ground that such an assignment implies a contract to reduce the chose into possession, and is equivalent in equity to such a reduction.

"This proposition was first overruled in respect to bankruptcy, and it was decided that whatever might be the right of purchasers for value, the assignees in bankruptcy were entitled to no such equity. It was next overruled as to all assignments, although for valuable consideration, if the chose were reversionary, and therefore incapable of present possession; leaving the question still open whether, if it were capable of immediate possession, or became so during the coverture, the wife should be excluded.

"The principle is now extended to all cases, and it is held that, although the husband's contract for value may, as between himself and the assignee, be equivalent to a reduction into possession, yet, against the wife, who is no party to the contract, it cannot have that effect." For these positions, the author refers to several late cases, which we find, so far as we have the books at hand to examine them, to be opposite to the purpose for which they are cited. It is worthy of remark, too, that no cases to the contrary are referred to by the editors (Messrs. Ludlow and Collins) of the second American edition. Indeed, the learned editors have not subjoined any note to the page upon which these propositions are found.

We come now to the examination of cases which are supposed to have established a contrary doctrine in this State.

The first in the order of time is Knight v. Leak, 2 Dev. & Bat. 183. That was the case of a vested legal remainder in the wife in a slave, which the Court held might be sold by the sheriff under execution against the husband, because he had the right to sell it himself, and thereby completely to transfer it to the purchaser. In arguing, the Court said: We understand the effect of an assignment by the husband of his wife's equitable interest in a chattel in which she has not the right of immediate enjoyment to be different; for such assignment would not prejudice her right, should he die before her and before the period allotted for such enjoyment to take effect. Hornsby v. Lee, 2 Madd. 16; Purdew v. Jackson, 1 Russ. 1; Honner v. Morton, 3 Russ. 65.

The next is Poindexter v. Blackburn, 1 Ired. Eq. 286. a legacy was given to the wife, which had not been received by the husband nor disposed of by him in his lifetime; and the Court decided that it survived to her, saying, "A legacy given to a married woman, or a distributive share falling to her during coverture, and not received by the husband nor disposed of by him in his lifetime, survives to the wife." Howell v. Howell, 3 Ired. Eq. 522, which came before the Court upon a bill for a writ of sequestration, was the case of a bequest of a female slave to one for life, remainder over to a married woman, and the executor assented to the legacy, and the husband afterwards sold the slave. The Court decided, as they had often done before, that the assent of the executor made the remainder a vested one; and they then go on to show that "Jesse Spurling (the husband) had such an interest in the woman Jude and her children as enabled him to sell and convey them, and that his vendee acquired by his purchase, the transaction being freed from other objections, a complete title; and that Mrs. Spurling (the wife) had no interest in them, and consequently no claim to the aid of

this Court. We are not unapprised that, in some recent cases in the English Courts of Chancery, this doctrine is denied as a principle of equity. Such, we consider, however, as the settled law of North Carolina. In Rogers v. Bumpass, 4 Ired. Eq. 385, the Court decided that, where the husband gave his bonds to the administrator of the father of his wife, of whose estate she was a distributee, the bonds being given for certain purchases made at the administrator's sale, and also for money lent to him out of the funds of the estate, there being no agreement that these were to be regarded as payments of the distributive share of the wife, the wife, after the death of her husband, was entitled to recover the whole of her distributive share. In coming to this conclusion, the Court said: "A debt, legacy, or distributive share of the wife is under the control of the husband, so far as to enable him to release, assign, or receive them. His release extinguishes them, and the collection of the money vests it in him as his absolute property. But if, in his lifetime, he neither releases, conveys, or receives her choses in action, but leaves them outstanding, they belong to the surviving wife."

The case of Weeks v. Weeks, 5 Ired. Eq. 111, was that of an expectant legal interest of the wife not assigned by the husband in his lifetime; and the Court said: "Although the husband may assign or release his wife's choses in action, or convey them during the coverture, they undoubtedly survive to her or her representative."

In Mardree v. Mardree, 9 Ired. 295, the Court said: "A distributive share accruing to the wife during the coverture does not vest in the husband, but will survive to the wife, unless received into possession by the husband." They held, however, upon the particular circumstances of the case, that the husband had reduced his wife's distributive share into possession, and consequently that it belonged to him.

From this review of the cases to which our attention was called by the counsel, and some others which we met with ourselves, it manifestly appears that there is not one in which it has been adjudicated, that the husband's assignee for value of his wife's equitable choses, can claim them against the surviving wife. Some of the expressions used by the Court, which we have quoted, may seem to imply that such was the opinion of the judge who decided them; but even as dicta they may well be

regarded as enunciations of a general rule, without its being deemed necessary to advert to the exception to or modification of it. The cases mainly relied upon by the counsel to establish the position for which he contended, were Knight v. Leak and Howell v. Howell. In the first of these, the dictum shows only what we admit, that the assignment by the husband of his wife's equitable interest in a chattel will not prejudice her right, should he die before her and before the period allotted for such enjoyment to take effect; but it does not pretend to go further, and say what would be the rule should the husband die before the wife, and after the period allotted for her enjoyment to take effect. The propositions are distinct, and have both been decided in favor of the wife in England, and we can see no good reason for holding here, that the admission of one of them in favor of the wife necessarily implies the rejection of the other.

In the other case of Howell v. Howell, we do not know that we understand what the Court meant when they said: "We are not unapprised that, in some recent cases in the English Courts of Chancery, the doctrine is denied as a principle of equity." What doctrine? and what was intended by the Court when they said, further, "Such, however, we consider as the settled law of North Carolina." We certainly can find nothing in what precedes or what follows these sentences to make out more than a mere conjectural dictum, that the doctrine for which we contend There are one or two other very recent cases was disavowed. which may seem to militate against the English principles to which we have referred; but which certainly are not adjudications against it, and may, we think, be shown to be consistent In Allen v. Allen, 6 Ired. Eq. 239, it was held that in this State a wife has no right, either as against her husband or his assignee for value, to have a provision made for her by a Court of equity out of a distributive share accruing to her during her coverture. And, further, that the husband is not at liberty to make a voluntary disposition of such distributive share, even in trust for his wife, so as to prevent it from being liable to his The first part of the decision, relating to what is creditors. called the wife's equity for a settlement, had been made before, in Bryan v. Bryan, 1 Dev. & Bat. Eq. 47, and Lassiter v. Dawson, 2 Dev. Eq. 383. It is admitted to be in opposition to the rule well settled in the English Courts of Chancery, and adopted

by most of the States of this Union. The policy of our rule is very fully discussed and ably vindicated by the Chief Justice RUFFIN, who delivered the opinion of the Court in Allen v. Allen, and it is not now to be questioned. The doctrine for which we contend is not at all opposed by the latter proposition decided in that case, but is rendered in some degree necessary by the first. We do not deny that the husband, or assignee of the husband, in his lifetime, may reduce the wife's equitable choses in action into possession, and thus make them his own; so may the creditors, and to that extent only goes the decision of which we are speaking, as well as the subsequent one in Barnes v. Pearson, 6 Ired. Eq. 482. The wife cannot resist the attempt of her husband, his assignee for value, or his creditor, to get possession of the legacy or distributive share accruing to her during coverture, and thus deprive her of it. If the husband die before he succeeds, the wife's right survives to her. What good reason is there why the same result should not follow from his dying before his assignee or his creditor had succeeded in his attempt? Why should the husband be able to transfer to another a greater right or interest than he has himself? We deprive by our rule the wife of her equity for a settlement; why go further, and deprive her also of her benefit of the right of survivorship in her own property? It is by no means a consoling answer, to tell her that our law provides handsomely for her out of her husband's estate. That may do very well where the husband has anything to leave, but is but mockery when he dies greatly indebted or insolvent.

Let us ponder for a moment and inquire, whether there is any fixed principle of equity which must of necessity operate so harshly against the right of the wife in such cases. In deciding Honner v. Morton, ubi supra, Lord Lyndhurst threw out a dictum, that equity considered the assignment of the husband as amounting to an agreement that he would reduce the property into possession; it likewise considered what the party agreed to do as being actually done, and, therefore, when the husband had the power of reducing the property into possession, his assignment of the chose in action would be regarded as a reduction of it into possession. Principles of equity are, or ought to be, founded upon the most refined and exact principles of justice; they ought to be as near as human frailty will permit the very

elements of justice itself. Now we cannot see any justice in the principle, that while the husband cannot himself acquire the wife's equitable choses in action without reducing them into possession, he may by a mere agreement in favor of an assignee for value produce such a result. We cannot see the justice, refined or otherwise, of the Court of equity not only assisting a purchaser to aid the husband in depriving his wife of her rights, but actually resorting to a sort of magic to do it at once, instantaneously, by a mere agreement to which the wife is no party. are, therefore, not surprised to find that such a doctrine could not commend itself to the enlightened mind of Vice-Chancellor CHADWICK, in the case of Ellison v. Elwin, 13 Sim. 309; of Vice-Chancellor Bruce, in that of Ashby v. Ashby, 1 C. M. 55; and of the judges in the other cases referred to by Mr. Adams. Our conclusion is, that the wife's right to her distributive share of an intestate's estate survives to her, if not reduced into possession by the husband or his assignee for value in his lifetime. It must therefore be declared in this case, that neither the defendant Yarbrough nor the defendant Battle, as the administrators of Thomas E. Yarbrough, deceased, is entitled to the distributive share of the defendant, Mrs. Green, in her father's estate.

The only question which remains to be considered is, whether the slaves which were put into the possession of the first husband of Mrs. Green by her father, are, under the circumstances stated in the pleadings, to be charged against her as advance-From the difficulty which might otherwise have attended this question, we are relieved by her fair and candid answer. She admits that they were intended by her father as advancements to her, and she submits that they may be charged against her by the administrator of her father in the distribution of his The plaintiff is entitled to a decree to have an account taken of his administration of his intestate's estate under the direction of the Court, and that he may settle with the parties entitled to distributive shares in the same, upon the principles above set forth. The costs of the plaintiff will be paid out of the estate of the intestate. The other parties will pay their own Decree accordingly. costs.

SHUTTLESWORTH v. NOYES.

(8 Mass. 229. Supreme Judicial Court of Massachusetts, 1811.)

Wife's choses in action and Trustee Process for the Husband's Debts.

In this case the only question made was, whether Downs should be adjudged the trustee of Noyes, the defendant. And as to this, the facts appearing from Downs's answer were, that he, after the marriage of Noyes with his wife Martha, now living, gave a note, not negotiable, payable to the said Martha at a future day, which had not arrived at the time of the answer by Downs. The consideration of the note was partly a debt due to the said Martha before her marriage, and partly a sum arising on the distribution of the estate of her deceased father.

SEDGWICK, J., said in substance, that the Court had a strong desire to protect this demand against attachments made by the creditors of the husband, if it could be done consistently with established principles of law; but that it was very clear, that a note payable to a feme covert is legally payable to the husband, and the property vests absolutely in him. He alone, during his life, has power to enforce payment, or discharge the demand; and after his death it would go to his executor or administrator, and not to the wife. It was therefore the opinion of the Court, that this demand was well attached by this process, and that Downs must be adjudged to be the trustee of Noyes, the principal defendant.

V

Dennison v. Nigh.

(2 Watts, 90. Supreme Court of Pennsylvania, 1833.)

Wife's choses in action and Attachment for her Husband's Debts.

Error to the Common Pleas of Franklin County.

This was scire facias upon a judgment on a foreign attachment, by James Dennison, against Samuel Nigh, garnishee of

John Lutshaw, in which the question arose whether a bequest to Mary, the wife of John Lutshaw, was the subject of a foreign attachment at the suit of his creditor.

That part of the will of Andrew Dennison, the father of Mrs. Lutshaw, which made the bequest, was this: "I will and allow that the residue of my estate be equally divided between my sons, John, Andrew, William, James, Samuel, and Robert, and my daughters, Betsy, intermarried with James Sweney, Mary, intermarried with John Lutshaw, Rebecca, intermarried with Robert Johnston, Nancy, intermarried with Adam Johnston; and the heirs of Hugh Dennison to have one share; which I allow to be paid to them, share and share alike, as the moneys may be received out of my estate." The testator then authorized his executors to sell all his estate, real and personal; but left this discretionary with them.

The Court below (Thompson, president) was of opinion that the bequest was not the subject of attachment, and therefore rendered a judgment for the defendant.

Dunlop, for plaintiff in error, cited Serg. on Att. 86; Roll. Abr. 551; Whiteside v. Oakman, 1 Dall. 294; Barnes v. Treat, 7 Mass. 271; 1 Day's Cas. 436; 1 Conn. 383.

Denny, contra, cited Morris v. Griffith, 1 Yeates, 192.

The decision of this case depends not on the Per Curiam. abstract question whether a legacy may be attached, but on the nature of the interest in another respect. It is enough for the defence of the garnishee that the ownership is not in the defendant, but in his wife; the interest bequeathed to her being a portion of her father's estate when turned into money. marriage is in effect a gift of the wife's personal estate in possession, it is said to be but a conditional gift of her chattels in action; such as debts, contingent interests, money owing her on account of intestacy, or orphan's portions in the hands of the 2 Vent. 341. Perhaps the husband Chamberlain of London. has, in strictness, but a right to make them his own, by virtue of the wife's power over them, lodged by the marriage in his But, if these be not taken into his possession, or otherwise disposed of by him, they remain to the wife; and if he destines them so to remain, who shall object? Not his creditors, for they have no right to call on him to obtain the ownership of his wife's property for their benefit, especially as their debts

were not contracted on the credit of it; and until he does obtain it, there is nothing in him but a naked power, which is not the subject of an attachment. The case put in 1 Rol. Abr. 551, of goods tortiously taken from the defendant in the attachment by the garnishee, comes entirely up to the principle. It was held that the goods could not be attached, because the defendant had but a right of action for the trespass: Without, then, determining whether a legacy can be attached in any case, we deem it enough for the present question, that the husband had but a naked power over the subject of this bequest.

Judgment affirmed.

ROBERTSON v. NORRIS.

(11 Ad. & E. N. s. 916. Court of Queen's Bench, 1848.)

Interest of Husband in Wife's Land.

COVENANT, by assignees of a lessor of land, against a lessee. The declaration stated that one Mary J. S. Davis had become seised of the reversion in fee, as devisee of lessor; that she had intermarried with one Reymer; and that thereupon Reymer and his wife, in right of his wife, became and were seised in their demesne as of fee of and in the said demised premises, expectant on the determination of the lease; it then alleged that, by indenture, &c., made between Reymer and his wife of the first part, Mary Davis, her mother, of the second part, and the plaintiffs, of the third part, "Reymer granted, bargained, sold, and released unto the plaintiffs the said reversion of and in the said demised premises, to hold to the plaintiffs, their heirs and assigns," during the coverture.

2d plea. That "Reymer did not grant, bargain, sell, or release unto the plaintiffs the said reversion of and in the said demised premises," modo et formā. Issue thereon. On the trial before Williams, J, at the Somersetshire spring assizes, 1847, it appeared that the indenture of release had not been executed by the wife, and that the husband, who had executed it,

was not tenant by the curtesy. It was thereupon objected that her reversion had not passed to the plaintiffs, and that the above issue on their part was not proved.

The learned judge overruled the objection. Verdict for plaintiffs, with leave to move to enter a verdict for the defendant on this issue.

Crowder, in Easter term last, obtained a rule nisi, accordingly. In last Hilary vacation, 1

Butt and Barstow showed cause. The husband took a freehold interest during the joint lives of himself and his wife. This point is discussed in note (2) to Co. Litt. 326 a. though by our law a woman does not now communicate her rank or titles of honor to her husband, yet the freehold, or the right of possession, of all her lands of inheritance vests in him immediately upon the marriage, the right of property still being preserved to her. 1 Inst. 351 a, 273 b. And see Pothier, Traité des Fiefs, vol. i. p. 123.2 This estate he may convey to another. An incorrect statement in the book called Cases in Equity, during the time of Lord Talbot, fol. 167, of what was delivered by his lordship in the case of Robinson v Comyns, Cas. Eq. temp. Talbot, 164, 167, seems to have given rise to a notion that the husband could not make a tenant to the præcipe of his wife's estate, for the purpose of suffering a common recovery of it, without the wife's previously joining in a fine; but it now seems to be a settled point that he can." Authorities to the same effect are collected in 1 Roper's Hus. & Wife, p. 3, 2d ed. land might have been extended under an elegit against the husband (note (1) to Underhill v. Devereux, 2 Wms. Saund. 69 c, 6th ed.); if he had become bankrupt, a freehold interest during the coverture would have passed to his assignees (Michell v. Hughes, 6 Bing. 689, 695, citing Com. Dig. tit. "Bankrupt," D. 11).

Crowder and Montague Smith, contra. By the argument for the plaintiffs, the wife is treated as altogether an unnecessary party to the deed of assignment. Yet the declaration of itself states, as was necessary, that husband and wife in right of the wife were seised; and they must both have joined in an action for breach of covenant. 1 Bac. Abr. 729, 7th ed. tit. "Baron &

¹ February 11th. Before Lord Den² See Œuvres Posthumes, tome i.

MAN, C. J.; PATTESON, COLERIDGE, p. 50 (ed. 1777), Part 1, c. 2, art. 2.

and Wightman, JJ.

Feme," K. If the husband had the freehold, it could not be in the wife in case of his attaint. Yet it is said in Co. Litt. 351 a: "It appeareth here by Littleton, that if a man taketh to wife a woman seised in fee, he gaineth by the intermarriage an estate of freehold in her right, which estate is sufficient to work a remitter, and yet the estate which the husband gaineth dependeth upon uncertainty, and consisteth in privity; for if the wife be attained of felony, the lord by escheat shall enter and put out the husband; otherwise it is if the felony be committed after issue had. Also, if the husband be attained of felony, the king gaineth no freehold, but a pernancy of the profits during the coverture, and the freehold remaineth in the wife." The note to Co. Litt. 326 a, cited for the plaintiffs, stating that the wife's freehold vests in the husband on marriage, is correct; but the freehold vests in the wife also; it vests in both in right of the "In a real estate, he" [the husband] "only gains a title wife. to the rents and profits during coverture; for that, depending upon feudal principles, remains entire to the wife after the death of her husband, or to her heirs if she dies before him; unless, by the birth of a child, he becomes tenant for life by the curtesy." 2 Bl. Com. 433. Cur. adv. vult.

Lord Denman, C. J., in this term (May 1st) delivered the judgment of the Court.

A question arose in this case as to the interest which a husband takes in lands which belong to his wife in fee-simple, and as to his power to convey to another person an interest in those lands for the joint lives of himself and wife.

It is laid down in Co. Litt. 351 a, that he is entitled to the pernancy of the profits, and that, if he be attainted, that pernancy will pass to the crown, the freehold still remaining in his wife. But it is also laid down in Co. Litt. 326 a, and in the notes, that he may make a tenant to the præcipe of his wife's land, and that he has an estate which he may convey to another. He has not, however, any greater interest than during the joint lives of himself and his wife.

Now the second issue raised by the pleadings in this case, which was an action of covenant on a lease made by a person who had afterwards devised to the wife, was, whether the husband did by indenture convey to the plaintiffs the reversion of which he and his wife were seised in right of the wife, to hold

to the plaintiffs during the coverture of the wife with the husband. This he certainly did. The indenture professed to be made by him and his wife, but was not executed by her; and it passed no more than his interest. That was an estate during the joint lives of himself and his wife, which was all that he professed to convey by the terms of the deed.

The rule to enter a verdict for the defendant on that issue must be discharged.

Rule discharged.

BACK v. ANDREW.

(2 Vern. 120, s. c. Pre. Ch. (Finch's) 1; 2 Eq. Cas. Abr. 230. High Court of Chancery, 1690.)

Estates by Entireties: Husband powerless to alien.

Purchase made of a copyhold estate by John Andrew, the husband; and the surrender taken to John Andrew and his wife, and Elizabeth, his daughter, and their heirs. The said John Andrew, as being visible owner of the estate, takes upon him to make a conditional surrender, by way of mortgage, to the plaintiff, and afterwards dies; the plaintiff's bill was against the mother and daughter, to discover their title, and to set aside their estates as fraudulent against the plaintiff, who was a purchaser; sed non allocat'. Bill dismissed, but without costs; for, per Cur., the husband and wife take one moiety by entireties, so that the husband cannot alien nor dispose of it so as to bind the wife, and the other moiety is well vested in the daughter.

GREEN on the demise of CREW v. KING.

(2 W. Bl. 1211. Court of Common Pleas, 1778.)

Estates by Entireties: Husband powerless to alien or devise.

EJECTMENT in Middlesex, tried before DE GREY, C. J. Verdict for the plaintiff, subject to this special case. The premises were copyhold, parcel of the manor of Ashford, and were sur-

rendered, in 1734, by John Beauchamp, "to the use of John Fitzwalter and Elizabeth, his wife, and the longer liver of them; and, after the death of the longer liver of them, to the right heirs of the said John and Elizabeth forever." And they were admitted accordingly.

On the 4th of September, 1769, John Fitzwalter, having purchased other copyhold estates in the said manor, made a general surrender of all his copyhold estates to the uses of his will; and, on the 23d of June, 1770, made his will, by which (after devising all his freehold and copyhold estates to his wife for life, and after her decease, a certain estate not now in question to Thomas Merrick, in fee) he gives "all the rest, residue, and remainder of his real estate, both freehold and copyhold, to Joseph King, to hold to him and to his heirs and assigns forever." John Fitzwalter died in April, 1771, and Elizabeth, his wife, survived him; but neither of them had issue of their bodies. After his death, she surrendered her estates in the said manor to the uses of her will; and, on the 4th of March, 1772, devised her copyhold estate in Ashford to Thomas Crew, his heirs and assigns forever, and died on the 4th of March, 1773.

Qu. If Thomas Crew, the lessor of the plaintiff, is entitled to recover.

Hill, for the plaintiff, insisted that there are only two possible constructions that can be made of the surrender in 1734.

1. That the husband and wife were tenants for life, with a contingent remainder to the survivor in fee. If so, the husband, being tenant for life of a copyhold, could not bar this contingent remainder (Roll. Abr. tit. "Uses"), and therefore it survived to the wife.

2. Which is the true construction, that they were joint-tenants of the fee; and, if so, being husband and wife, they took by entireties, and not by moieties; so that it is clear the husband could not dispose of it.

Grose, for the defendant, argued that the intent of the surrender must govern, which, he said, was plainly to provide for the husband and wife, and their issue, without power for either to alien. That the best way to effectuate this intent was to construe them joint-tenants for life, with contingent remainders to their issue, in tail or in fee. The most that the husband and wife can take is an estate tail, and then the wife had nothing to devise. In Beresford's case, 7 Co. 41, the Court supplied the words, "of their bodies," after the general word, "heirs." And in Frogmorton v. Wharrey, M., 11 Geo. III. C. B., an estate to A., and the heirs of the body of A. and B., was held an estate for life to A., with a contingent remainder to the issue. And as that contingency has now failed in the present case, the reversion which remained in the vendor must take place. Or, take it to be an estate tail in both, the reversion in fee still rested in the surrenderor, and must now, on failure of the estate tail, take effect. And, upon an ejectment, it is sufficient for the defendant to show a title out of the lessor of the plaintiff.

DE GREY, C. J., stopped Hill in his reply, saying that though the case was a little out of the common road, there was no great difficulty in it. The question is not on a will or a marriage settlement, so as to require us to desert the legal operation of the words, in order to effectuate a supposed intention to the contrary. It is on a purchase made by the husband after marriage, which must have exactly the same construction as a voluntary settlement by deed. Nothing can be collected but from the words of the surrender itself. The wife is not bound by it, but might disagree to it after the death of her husband; but, it being for her benefit, her consent is therefore presumed.

The word "heirs" must be taken in its legal sense as a word of limitation, as there is no proof that it was meant as a word of purchase Taking, then, the case in this light, it falls exactly within a nice distinction laid down in our ancient books, and which, having never been overruled, continues law at this day.

The same words of conveyance which would make two other persons joint-tenants, will make a husband and wife tenants of the entirety; so neither can sever the jointure, but the whole must accrue to the survivor. What is laid down in Litt. sect. 525, and Co. Litt. 299 b, will govern this case. And, indeed, could the husband have severed the jointure and disposed of the wife's property, his devise would not effect it; for the suvivorship or jus accrescendi accrues per mortem; the right of the devisee is post mortem. I, therefore, think the plaintiff must recover.

Gould, J., absent.

BLACKSTONE, J. The transaction of 1734 being a purchase for valuable consideration, there is no ground to surmise that any

estate or interest was left in the vendor; and, indeed, he has conveyed by the words of his surrender as complete a fee-simple, "to John and Elizabeth and their right heirs forever," as words can possibly create.

I entirely agree with Lord Chief Justice as to the law of this case, which, though ancient, has been recognized in Purefoy and Rogers, 2 Lev. 39; and Back and Andrews, 2 Vern. 120, is a case directly in point, and upon a copyhold surrender also. This estate differs from joint tenancy, because joint-tenants take by moieties, and are each seised of an undivided moiety of the whole, per my and per tout, which draws after it the incident of survivorship or jus accrescendi, unless either party chooses in his lifetime to sever the jointure. But, husband and wife being considered in law as one person, they cannot during the coverture take separate estates; and, therefore, upon a purchase made by them both, they cannot be seised by moieties, but both and each has the entirety. They are seised per tout, and not per my.

The husband, therefore, cannot alien or devise that estate, the whole of which belongs to his wife as well as himself. But had they been joint-tenants, while sole, and afterwards intermarried, they still would remain seised of their respective moieties, and the husband might sever the jointure and alien his own moiety. Bro. Abr. Cui in vita, 8.

This is on supposition that the surrender of 1734 operated as a grant of an immediate estate to both John and Elizabeth, in fee, which I hold to be its true operation. But, even supposing it a grant to the husband and wife for their lives, with a contingent remainder to the survivor in fee, the effect would be just the same. For both being seised of the entirety for their joint lives, the husband could not by any alienation destroy the particular estate so as to bar the contingent remainder; and then, upon his death, she (as survivor) became immediately seised in her own right of the remainder in fee-simple. So that quacunque via data, her devisee must recover.

NARES, J., of the same opinion.

Postea to the plaintiff.

MARSTON v. NORTON.

(5 N. H. 205. Superior Court of Judicature of New Hampshire, 1839.)

Wills of Femes Covert.

This was an appeal from a decree of the judge of probate in this county, made on the 11th June, 1728, allowing and approving, in solemn form, a certain instrument as the last will and testament of Esther Norton. It was agreed by the parties that the said instrument, which purported to contain a devise by the said Esther of all her real estate to W. Norton, her husband, for life, and, after the decease of her husband, to John Norton in fee, and to appoint John Norton executor, was duly made, executed, witnessed, and published by the said Esther, as her last will and testament; that, at the time of making and publishing the same, the said Esther was of sound mind, and was the wife of the said W. Norton; and at the time the said instrument was executed, and in presence of the same witnesses, the said W. Norton made, signed, and sealed a memorandum under the said instrument as follows: "I, the said William Norton, husband of the said Esther Norton, do consent and agree that my wife, Esther Norton, should dispose of her real estate according to the above will."

Thomas Marston, the appellant, is one of the heirs at law of the said Esther.

The reason assigned for this appeal was, that the said Esther was, at the time of executing and publishing said instrument, a feme covert and the question was, whether the decree must be reversed for that cause?

Tilton, for the appellant [cited Osgood v. Breed, 12 Mass. 525; Lovelass, 144; Godol. Orphan's Legacy, 29; Sheppard's T. 402; Dublin v. Chadbourne, 16 Mass. 433; 12 Mass. 531; 1 Pick. 549].

Mason, Jr., for the appellee [cited 1 Reeves's Hist. 11, 111; 3 Turner's Hist. Anglo-Sax. 73; Beame's Glanville, 140; Glanville, 163; Bracton, 60; 1 Bro. Civil Law, 298; 4 Reeves's

Hist. 68; 4 Burn's Eccl. Law, 47, 59; 1 Sander's Uses, 80; Com. Dig. Devise, G. and H.; Rolle's Ab. 608; Gilb. Dev. 13; 4 Mason, 489].

RICHARDSON, C. J. The question in this case is whether a married woman can, with the consent of her husband, dispose of her real estate by a will? In ancient times, no lands or tenements were by the common law of England devisable by the last will of any person, except in particular places by custom. Coke, Litt. 111 b, and note 1; Litt. sec. 167; Wright's Tenures, 171–173; 6 Coke, 17, Wild's case; Cowper, 305.

And by the common law as it was understood in the reign of Henry II., a man's goods were not wholly at his own disposal by will; but his wife and children had an interest in them, of which he could not deprive them by a will. The shares of the wife and children were called their rationabilis pars, and the writ de rationabili parte bonorum was given to enforce the claim. 2 Bl. Com. 491; Fitzh. N. B. 284 Coke, Litt. 176 b.

It seems to have been settled in very ancient times that a married woman might, with the assent of her husband, dispose of her chattels by will. Bracton, 60; Moore, 339, Finch v. Finch; Cro. Car. 106, Johns v. Rowe; Lovelass, 143-146. But, by the common law, a feme covert never could make a valid devise of land, with or without her husband's consent, to any person whatever. Godol. 301; Shep. T. 402; Com. Dig. Devise, H. 3; Lovelass, 96; 3 Johns. Ch. 523, Bradish v. Gibbs; 4 Mason, 443, Picquet v. Swan. She was considered to be so entirely under the power of the husband that she could in no case make what in propriety of speech is called a will. 4 Burn's Eccl. Laws, 49; Powell on Devises, 97. By the statute of 32 H. VIII. c. 1, it was enacted, "that all and every person and persons having a sole estate or interest in fee-simple, or seised in fee-simple, in coparcenary, or in common of any manors, lands, &c., shall have power to give, dispose, will, and devise, by will, in writing or otherwise, by act executed in his lifetime, all his said manors," &c.

The language of this statute was broad enough to include all persons. But it seems to have been thought by the Courts of common law that, upon the construction of statutes, not the mere letter, but the internal meaning and sense of the legislature, was to be considered; and, although this statute gave power to every

person having land to devise it, yet it was thought that it could not have been the intention of the makers of the statute, that persons who were disabled by the common law to dispose of their lands by other conveyances should have the power to devise it; therefore, in expounding that statute, a married woman was considered as not comprehended under these general words. Powell on Devises, 93-95. And, as soon as an attempt was made in the ecclesiastical Courts to establish the wills of married women, it was enacted by parliament that wills of lands by married women should not be taken to be good in law. 4 Burns, 46.

In Massachusetts, by a statute passed in 1692, it was enacted, "that every person lawfully seised of any lands, &c., in his own proper right, in fee-simple, shall have power to give, dispose, and devise, as well by his last will and testament in writing as otherwise, by any act executed in his life, all such lands," &c. Prov. & Col. Laws, 230. And the statute of 1783, c. 24, contains a provision substantially in the same language. In the case of Osgood v. Breed, to which we have been referred by counsel, it was decided by the Supreme Court of Massachusetts, that married women have not power under their statute to make a will of lands, even with the consent of their husbands. Our provincial act of the 4 Geo. I. c. 73, was copied verbatim from the said statute of Massachusetts passed in 1692. Prov. Laws, 104.

The statute of February 3, 1789, enacted, "that every person lawfully seised and possessed of any estate in lands, &c., of the age of twenty-one years and upwards, and of sane mind, shall have power to give, devise, and dispose of the same, as well by his last will and testament in writing as by any other act duly executed," &c.

The statute of July 2, 1822, contains a provision on this subject, substantially the same as the said provision in the statute of February 3, 1789.

It thus appears that the provisions on this subject in the statutes of England and of Massachusetts are almost precisely the same as in our statutes, and we are of opinion that the construction upon these provisions in relation to married women in England and Massachusetts are entirely correct.

A married woman is not by the common law sui juris, but is sub potestate viri. She is under a civil disqualification arising from want of free-agency, and not from want of judgment, and

it seems to us to be wholly incredible that the legislature should have intended to give to a married woman the power of devising her lands at her decease, while the power of disposing of them at her will is denied to her during her life. Her will of chattels may be made valid by the assent of her husband, because the gift is, in effect, his gift, and the property passes from him. But with respect to her real estate, the case is different. Her lands at her decease go not to him but to her heirs, and his assent to her will of real estate can give it no validity.

Decree of the Court below reversed.

CUTTER v. BUTLER.

(25 N. H. 343. Superior Court of Judicature of New Hampshire, 1852.)

Wills of Married Women. — Assent of Husband thereto, and Probats thereof.

TROVER. The plaintiff proved that the articles in question were the property of his wife, Hannah A. Cutter, at the time of his intermarriage with her; that she afterwards died, and the property came into the defendant's possession; and upon a demand for it, on the fourth day of June, 1850, he refused to deliver it to the plaintiff.

The defendant offered to prove that before said marriage the plaintiff verbally assented that said Hannah should have her own property to her own use and disposal, and after the marriage talked with her about making a disposition of her property, and went with her to a magistrate for the purpose of her making her will, and memoranda were then furnished to the magistrate in order that he might write a will, though for some cause he did not write one, and that on the 5th day of May, 1850, the will of the said Hannah, executed during her coverture, reciting that she had property to her sole and separate use, was proved in solemn form before the Judge of Probate, and the defendant, by virtue of said will and the decree of said judge, was appointed her executor, and on the 7th day of May, 1850, returned an inventory of her estate, including therein the chattels now in controversy. And that the plaintiff was present when said

inventory was taken, and pointed out to the defendant and appraisers the said chattels as articles belonging to the estate of said Hannah, separating them from others which he claimed as his own, and on the same day the defendant, as executor, took said articles into his own possession without objection on the part of the plaintiff.

The Court ruled that the facts proposed to be shown would not constitute a defence, to which ruling the defendant excepted. A verdict was taken for the plaintiff, which the defendant moved to set aside, because of the said ruling.

Atherton and Sawyer, for the defendant.

A. F. Stevens, for the plaintiff.

Bell, J. At common law, a will made by a married woman, disposing of her freehold estates, was entirely void. Shep. Touch. 402; 2 Bla. Com. 497; 2 Kent, Com. 170; 4 Kent, Com. 505; 3 Com. Dig. 15, Devise H. 3; Lov. Wills, 96; Pow. Dev. 97; Burn's Ec. Law, 49; Marston v. Norton, 5 N. H. 205; Osgood v. Breed, 12 Mass. 525; West v. West, 10 S. & R. 445; Fitch v. Brainard, 2 Day, 163; Bradish v. Gibbs, 3 Johns. Ch. 523; Picquet v. Swan, 4 Mason, 443.

Where her lands were placed in the hands of trustees, subject to be disposed of by will, a married woman might devise them by an instrument in the nature of a will, but which would be more properly an appointment, deriving its validity from the settlement or conveyance in trust. 2 Kent, Com. 170; 4 id. 505; Pridgeon v. Pridgeon, 1 Ch. Cas. 117; Rex v. Bettesworth, 2 Stra. 391; Fettyplace v. Gorges, 3 Bro. C. C. 8; Holman v. Perry, 4 Met. 492; Southby v. Stonehouse, 2 Ves. Sen. 612.

In this State, by the statute of 1845 (2 Laws, p. 235), a married woman is enabled to dispose of her real estate by will. Such will must, like others, be proved in the Probate Court. The power thus given extends to all lands, tenements, and here-ditaments, and all rights thereto and interests therein, whether legal or equitable. Rev. Stat. c. 1, § 17.

There is, however, a proviso, that such will shall in no case affect injuriously the rights acquired by the husband in any estate so devised, by virtue of the marriage contract. No statute has been passed here giving to married women the general power to dispose of personal property by will.

By the Revised Statutes, c. 149, § 3, it is provided that, when-

ever any married woman shall be entitled to hold property in her own right and to her own separate use, she may dispose of said property by will, as if she were sole and unmarried.

The principle declared by this statute has long been an admitted principle in equity, Peacock v. Monk, 2 Ves. Sen. 190; Fettyplace v. Gorges, 1 Ves. Jr. 46, s. c. 3 Bro. C. C. 8.; Rich v. Cockell, 9 Ves. 369; and, in the ecclesiastical Courts, Tappenden v. Walsh, 1 Phill. 352; Spitty v. Bailey, 16 Jur. 92, s. c. 10 L. & E. 570; and may well be regarded as merely declaratory of the common law, 2 Kent, Com. 170; Holman v. Perry, 4 Met. 492; West v. West, 3 Rand. 373; Emery v. Neighbor, 2 Hals. 142; Strong v. Skinner, 4 Barb. S. C. 546; Society v. Wadhams, 10 Barb. S. C. 597.

By the statute of 1846 c. 327 (2 Laws, 307), married women have the same rights as they would have if unmarried, as to all such property as may have been secured to them to their own sole and separate use by a written contract entered into before marriage, or which may have been conveyed or devised to such married woman for such sole and separate use after the mar-Under this statute no trustee for the wife is usually But, as the husband is not empowered to convey necessary. any of his property to his wife in any other manner or with any other effect than he could do before the passage of the act, his conveyances must be made, as at common law, through the medium of a trustee. But the equitable interest so conveyed would be equally at the disposition of the wife by her will, as her legal estates, if the conveyance is in other respects valid. 1 Bla. Com. 442; 2 Kent, Com. 129; Rev. Stat. c. 1, § 17.

By the Revised Statutes, c. 149, § 3, when any husband shall have deserted his wife, and remained absent for three months, without making provision for the support of herself and her children; or when any cause of divorce exists, or any facts which, if continued, may be such cause, and the wife is the injured party,—she will be entitled to hold in her own right and to her separate use any property acquired by her by descent, legacy, or otherwise, and may dispose of the same without the interference of her said husband or of any person claiming under him. And by § 4, if any woman being the wife of an alien, or of a citizen of any other State, shall have resided in this State for the term of six months successively, separate from

her husband, she may acquire and hold property in her own right, &c.

No other provisions of the statutes of New Hampshire are recollected which apply to the wills of married women. Sec. 1 of chapter 156 of the Revised Statutes might seem broad enough to include the case of married women. "Every person of the age of twenty-one years, and of sane mind, may devise and dispose of his property, real and personal, and of any right or interest he may have in any property, by his last will in writing." But it has never been held to apply to the case of married women. Marston v. Norton, 5 N. H. 205; Osgood v. Breed, 12 Mass. 525; Anon. Dyer, 354; Pow. Dev. 140; Morse v. Thompson, 4 Cush. 562.

The cases which do not fall within these statutes must of course stand upon the general grounds of the common law. The following cases are recognized in the books which have come under our observation, in which at common law a married woman may make a will.

1. A married woman, executrix, might make a valid will of the personal property held by her in autre droit as such executrix, Shep. Touch. 402; God. Orph. Leg. 110; Plowd. 526; Fitzh. Executor, 109; 2 Bla. Com. 497; 3 Com. D. 15, Dev. H. 3; Lov. Wills, 166; and without her husband's consent, Scammell v. Wilkinson, 2 East, 552; Stowe v. Drinkwater, Lofft. 483.

But by the Revised Statutes, c. 158, § 9, marriage extinguishes the trust of an executrix, or administratrix, and this case can never arise here.

- 2. A woman, whose husband has been banished for life by an act of Parliament, may make a will. Co. Litt. 133 a; Shep. Touch. 402; Duchess of Portland v. Progers, 2 Vern. 104; Compton v. Collinson, 2 Bro. C. C. 385; Ex parte Franks, 1 Moo. & Sc. 1. So if her husband is transported, Newsome v. Bowyer, 3 P. W. 37; Goods of Martin, 15 Jur. 686, 8. c. 5 L. & E. 586; or is an alien enemy, Deerly v. Mazarine, 1 Salk. 116; Lov. on Wills, 266. Cases may perhaps arise here within the principle of these cases.
- 3. Personal property may be holden in trust, subject to the disposal of a married woman by her will, which she may not be entitled to hold in her own right nor to her separate use, so as

to bring her case within the terms of the Revised Statutes, c. 149, before cited. In such case her will relating to such property will be valid and effectual by virtue of the power, as in the case of real estate at common law before stated, not as a will strictly, but as an appointment in nature of a will. 2 Kent, Com. 170; 4 id. 505; Lov. Wills, 266; Southey v. Stonehouse, 2 Ves. 212; 2 Bla. Com. 497. But still such will, to be effectual, must be proved in the Court of Probate. Lov. Wills, 266: Stone v. Forsaith, Doug. 707; Cothay v. Sydenham, 2 Bro. C. C. 391; Osgood v. Breed, 12 Mass. 525.

- 4. The husband may agree with wife, or with one of her friends as trustee for her, either before the marriage or after the marriage, upon a sufficient consideration (1 Roper, Hus. & Wife, 169), to allow her to dispose of certain property, or of a certain amount of personal property, by will; and such an agreement will be held binding upon the husband in equity, and her will will be held valid as an appointment under the power given her by such contract, and that without the assent of her husband. Lov. Wills. 266; Newburyport Bank v. Stone, 13 Pick. 420; Tilley v. Pierce, Cro. Car. 376. Such a will, it is said, cannot be proved as such, without the assent of the husband; but it may be proved as a testamentary paper, and will derive its effect from the agreement of the husband, who will be held to its specific performance. 2 Roper, Hus. & Wife, 188; 2 Black. Com. 498; Stone v. Forsaith, Doug. 707, note. If a married woman has any pin money, or separate maintenance, she may dispose of her savings thereout by any writing, in the nature of a will, without her husband's consent. Lov. Wills, 266; 2 Black. Com. 498; Prec. in Ch. 44.
- 5. By the assent of the husband, the wife may devise her chattels real. 2 Black. Com. 497; Dr. & St. 1 Ch. 7. The phrase "real estate" in the statute of 1846 is sufficiently comprehensive to include this class of interests, but they are excluded from the operation of this statute by the proviso before referred to. Such chattel interests at common law survive to the husband if he outlives his wife: 2 Kent's Com. 134; Went. Ex. 196; 2 Black. Com. 497; Ognell's case, 4 Co. 51; Moody v. Matthews, 7 Ves. Jr. 183; and her will, if carried into effect, must, therefore, injuriously affect his interest in relation to them. Her will as to these is valid on common-law principles only.

- 6. She may dispose, by her will, of her choses in action, including debts and contracts due to her, and her right of action for goods carried away [biens asports] before the marriage, by a like assent on the part of the husband. Johns v. Rowe, Cro. Car. 106; Finch v. Finch, Moor, 339, s. c. 2 And. 92; Anon. 1 Mod. 211; Scammell v. Wilkinson, 2 East, 552; Stevens v. Bagwell, 15 Ves. 139; Shep. Touch. 402; 2 Bro. Abr. Testament. Such interests the husband, besides his right to collect or assign them at his pleasure during the life of the wife, has a right to claim for his own benefit after her decease, subject, however, to the burden of administering her estate, and to the payment of her debts. 2 Kent's Com. 135; 2 Black. Com. 515; Whitaker v. Whitaker, 6 Johns. 112; Went. Ex. 197.
- 7. She may, by her husband's assent, bequeath by will the personal chattels in possession which belonged to her at her marriage, or which have fallen to her afterwards. These, by the policy of the old law, became instantly upon the marriage, or upon their subsequent acquisition, the absolute property of the husband. Co. Litt. 351-356; 2 Kent's Com. 143; Went. Ex. 196; Lov. Wills, 266. This ancient policy is in itself both unjust and absurd; and at the present time the rights of the husband to this kind of property, 2 as well as to the wife's choses in action, is regarded rather as a marital right, which he may insist upon or waive, as he pleases, and which, if he does waive, the goods, as between him and her representatives, remain the property of the wife. Such waiver may be shown by an agreement on the part of the husband, either before or after the marriage, that the property should remain hers, or that he should allow her to dispose of it by will, or by any agreement by which it should appear that the right of the property as between them is to remain in the wife. 1 Roper, Hus. & Wife, 169; Estate of Wagner, 2 Ash. 448; Parsons v. Parsons, 9 N. H. 321; Marston v. Carter, 12 N. H. 164; Wheeler v. Moore, 13 N. H. 481; Coffin v. Morrill, 2 Foster, 352.
- 8. The wife, without any previous agreement, or any claim to the property which can be directly shown, may assume to dispose by her will of the personal property of the husband; and,

Brook v. Sir Wm. Turner; s. c.
 Mod. 170.
 See Hall v. Young, 37 N. H. 134,
 Bish. Mar. Wom. §§ 121–126, as to this doctrine's being peculiar to the State of New Hampshire.

if the husband afterwards voluntarily assents to such will, it will be effectual to pass the property, and will be a good and valid will, on the ground that such assent is evidence of an agreement between them that the wife should have a right to make such disposal of the property, and of competent authority given by him to her to make it. Swin. Wills, 89; 1 Rob. Wills, 23; Shep. Touch. 402; and 1 Bro. Abr. 236, Devise, 34, where it is said a *feme covert*, by the assent and will of her husband, made a will, and devised the half of the goods of her husband and made her executor, who proved the will by the assent and will of the husband, and [her will was held] good. Otherwise it seems, if the husband prohibit the proving of the wife's will after her death; for then the whole is void, for the husband may countermand it. And this happened at St. Albans in the 24 Henry VIII.

Several of these cases agree in one respect, and stand upon the same reason. In these, the will operates directly to affect the rights of property of the husband, though not in all to the same degree. These are the devise of the chattels real, and of the choses in action of the wife, of the chattels in possession of the wife, and of the personal property of the husband, where the will does not take effect by virtue of any power of appointment.

In these cases the property is either in part, or absolutely and entirely the property of the husband, and the title to it under the will of the wife, so far as it affects his interest, passes from him to the legatee, and it is his gift. Anon. Mod. 211; Went. Ex. 196; Prest. Touch. 402; Peacock v. Monk, 1 Ves. Jr. 190; Pow. Dev. 164; Osgood v. Breed, 12 Mass. 525. Where the interest or rights of the husband are thus affected by the will of the wife, it is settled by decisions of the Courts, too often repeated to be disregarded, that the will of the wife is entirely ineffectual without the assent of the husband. Johns v. Rowe, Cro. Car. 106; Richardson v. Seize, 12 Mod. 306; Shardelow v. Naylor, 1 Salk. 313; 1 Rob. Wills, 23; Ognell's case, 4 Co. 48; Lov. Wills, 266; 2 Black. Com. 497; 2 Kent's Com. 170.

It therefore becomes material to inquire what is a sufficient assent of the husband to render such a will effectual. The following principles may, we think, be fairly deduced from

the cases and books which have been found to bear on the subject:—

A general assent that the wife may make a will is hardly sufficient. There must ordinarily be evidence of an assent to the particular will which is made by the wife. 1 Rop. Hus. & Wife, 169; King v. Bettesworth, 2 Stra. 891; 2 Black. Com. 497; 1 Bro. Abr. Devise, 34.

If there is a previous assent or agreement of the husband that the wife should make a will, very slight evidence of assent afterward to a will in accordance with such agreement, will be sufficient. 1 Rop. 169; Brook v. Turner, 2 Mod. 170.

At one period, it was held that the husband must assent at the time of the probate, Swin. Wills, pt. 2, § 9, pl. 10; 1 Burn's Ec. Law, 52; Henley v. Phillips, 2 Atk. 49; Anon. 1 Mod. 211; and might revoke his consent at any time during his wife's life, or after her death, before probate. 1 Rop. 169; Swin. Wills, 89; 1 Burn's Ec. Law, 52; Anon. 1 Mod. 211. But it is now held that, if the husband assent to the will after the death of the wife, he will be forever bound, and any subsequent dissent will be immaterial. 1 Rob. Wills, 23; 1 Rop. 169; Maas v. Sheffield, 10 Jur. 417.

The husband's assent may be shown by circumstances as well as by direct proof. 1 Rop. 169; Lov. Wills, 266.

If, after the wife's death, the husband suffer the will to be proved, and deliver the goods accordingly, the testament is good. Shep. Touch. 402.

A feme covert devises goods, and the baron delivers the goods to the executor of the wife, the Court, upon this presumption adjudged that the baron gave precedent assent to the making of the will. 5 Ed. II. cited in Moore, 192, pl. 341; 4 Vin. Abr., 164.

If the husband consent that his wife shall make a will and accordingly she doth make a will and dieth; and if after her death he comes to the executor named in the will and seems to approve her choice, by saying that he is glad she appointed so worthy a person, and seems to be satisfied in the main with the will, and recommends a goldsmith and coffin maker and scutcheon painter to be employed by him, this is a good assent, and makes it a good will, though he afterwards opposed the probate. His disagreement, after his former assent, will not avoid the will, because such assent is good in law, though he knew

not the particular bequests in the will. Brook v. Turner, 2 Mod. 170; 2 Keble, 624, pl. 3; s. c. 4 Vin. Ab. 164.

A married woman made her will with the consent of her husband, expressed at the time, and testified by his being a subscribing witness to it. After her death, but before probate, he obtained the will for an alleged particular purpose from the alleged universal legatee therein named, giving the legatee at the time a written memorandum containing his sanction of the will. Subsequently he took out letters of administration to his wife as dead intestate. It was held he could not withdraw his assent so given, and that an allegation pleading the above facts, and others in connection, was admissible on the part of the universal legatee seeking to establish the will. Maas v. Sheffield, 10 Jur. 417, cited in 5 Harr. Dig. 1654.

In Vermont, it was held that the assent of the husband to the wife's will, under his hand and seal during the coverture, will be sufficient. Fisher v. Kimball, 17 Vt. (2 Wash.) 323.

In the present case it appeared that the property in question belonged to the wife before her marriage, and the evidence of the defendant tended to prove the assent of the husband before and during the marriage, that the wife should make a will and dispose of the articles in question; that the will was proved in solemn form without objection; that the husband was present when the inventory was made, and pointed out the articles which belonged to the wife, and suffered the executor to take them away without objection. This evidence, if believed, would have been proof of assent entirely sufficient.

It is now well settled that the will of a married woman, whether it operates by virtue of a power or otherwise, is so far of the nature of a will strictly, that it must be executed in conformity to law, Casson v. Dade, 1 Bro. Ch. 99; and it must be proved in the Court of Probate. Anon. 1 Mod. 211; Stone v. Forsaith, Doug. 707; Ross v. Ewer, 3 Atk. 156; Jenkins v. Whitehouse, 1 Burr. 431; Cothay v. Sydenham, 2 Bro. C. C. 392; Rich. v. Cochell, 9 Ves. Jr. 369; 2 Rop. 188; Lov. Wills, 266; Osgood v. Breed, 12 Mass. 525; Bank v. Stone, 13 Pick. 420; 4 Kent's Com. 505; Society v. Wadhams, 10 Barb. S. C. 606; Picquet v. Swan, 4 Mason, 443.

The probate, if the will embraces different kinds of property, as in the case, will be limited to the property which the wife

had the power to devise. Tappenden v. Walsh, 4 Phill. 352; Moss v. Brander, id. 254.

The Court of Probate has consequently jurisdiction to decide upon the proof of the will, and, having such jurisdiction, its decisions are binding and conclusive upon parties and privies, as to the testamentary capacity of the wife, so far as relates to the property devised. Osgood v. Breed, 12 Mass. 525; Bryant v. Allen, 6 N. H. 116; and as to the assent of the husband to the will, where such assent is necessary to give it effect; and it would seem, as to his assent, that the particular property should pass by the will, so far as it is set forth and described in the will. If the husband designs to controvert either of these things, the time and place appointed for that purpose by the law would seem to be the Courts of Probate, at the time of the allowance of the will, and not afterwards nor elsewhere. However this may be, the evidence offered in this case was competent to establish a good defence, and the verdict must be set aside.

WHITAKER v. WHITAKER, Executor.

(6 Johns. 112. Supreme Court of New York, 1810.)

Husband's Right to administer on the Estate of his Wife, and to the Surplus thereof.

Pleading, &c.

This was an action of assumpsit brought against the defendant, as surviving executor of the last will and testament of Edward Whitaker, deceased. The first count in the plaintiff's declaration stated, "That whereas Edward Whitaker, deceased, in his lifetime, to wit, on the twentieth day of March, 1802, at Kingston, &c., was indebted to the plaintiff in the sum of \$2,000 lawful money, &c., for money, by the plaintiff, before that time, lent and advanced to the said Edward in his lifetime, and at his special instance and request; and the said Edward, being so indebted in his lifetime, he, the said defendant, as such executor, after the death of the said Edward, in consideration thereof, afterwards, to wit, on the 17th March 1808, as such surviving executor aforesaid, at Kingston, &c., undertook, and then and

there faithfully promised the plaintiff to pay him, the said lastmentioned sum of money, when he as such surviving executor, as aforesaid, should thereto, afterwards be requested," &c.

There were similar counts, also, for money paid, laid out and expended, money had and received to the use of the plaintiff, work and labor, &c., goods sold and delivered, &c., and the declaration concluded as follows: "Yet the said Edward, in his lifetime, and the said defendant, surviving executor as aforesaid, since his death, although often requested, &c., have not nor hath either of them paid the said several sums of money, or any part thereof, to the said plaintiff; but the said Edward, in his lifetime, refused to pay the same, and the said defendant, as surviving executor, as aforesaid, since his death, still doth refuse to pay the same to the plaintiff, whereby the said plaintiff says he is injured, and damnified to \$2,000," &c.

The defendant pleaded that he had not promised and undertaken in manner and form, &c., with notice of a set-off.

At the trial, the plaintiff produced in evidence a receipt given by Edward Whitaker, deceased, the testator, to T. C. Dewitt, a witness produced by the plaintiff, and the account accompanying the receipt, which was as follows: "Received in Kingston, September 29th, 1779, the above sum of 1,492l. 8s. 9d. in goods, and T. C. Dewitt's note, being the one sixth part of the personal estate of the late Henry Dewitt, and the late Mary Dewitt, deceased, as per inventory, for my son, Edward Whitaker, jun., a (Signed) EDWARD WHITAKER." This receipt was at the foot of an inventory of one sixth of the personal estate of Mary Dewitt, deceased, delivered to the witness, T. C. Dewitt, who testified that Edward Whitaker, the testator, about the year 1769, married Elizabeth Dewitt (the mother of the plaintiff, and the sister of the witness, and one of two daughters of Henry and Maria Dewitt) in the lifetime of her mother. The mother died before Elizabeth Dewitt, and about eighteen months after the birth of the plaintiff, who is an only child, and was born the 12th May, 1770; the settlement of the estate mentioned in the receipt took place at the date of the receipt, which was given for 1,490l. 8s. 9d. in continental money, there being then no other currency, and which sum was equal to 1021. 6s. 5d. in gold and silver; that the testator took also the note of the witness for a sum, in continental money, equal to 75l. 13s. 11d. in gold and

silver, which note, with one month's interest, was paid the 30th November, 1779, in continental money; the residue of the sum specified in the receipt being made up by the articles mentioned in the inventory. It appeared that the plaintiff, after he came of age, in the lifetime of his father, worked for him, and was paid an account exhibited by him for work.

A verdict was taken, by consent, for the plaintiff, subject to a case; reserving all questions of law, and with liberty to modify the verdict, as to the amount of principal and interest to be recovered, or to alter it into a verdict for the defendant if the Court should be of opinion that judgment ought to be entered for the defendant; and that the defendant might also, at the same time, move in arrest of judgment.

L. Elmendorf, for the defendant.

Sudam, contra.

Spencer, J., delivered the opinion of the Court. The defendant's counsel made several points on the argument, two of which only I deem it requisite to examine: 1, the validity of the declaration; and, 2, the testator's liability in consequence of the receipt of the 29th of September, 1779.

The objection is, that the promise, to be rendered binding, ought to have been in writing, or alleged to have been made in consideration of assets. The counsel seemed to suppose that the judgment on this count would be de bonis propriis and that the executor would in this mode of declaring be prevented from pleading plene administravit. If such would be the consequence then I should hold the objection to be valid; but according to the case of Secar v. Atkinson (1 H. Bl. 102), and of Executors of Hughes v. Hughes, 7 Bro. P. C. 550 and 2 Saund. 117 e, note 2, the judgment will be de bonis testatoris, and this mode of declaring is adopted merely to save the statute of limitations, consequently the defendant is not prevented from making any defence, under such a form of declaring, which he might have made had the declaration stated the promise of the testator and his liability only.

The second point is clearly with the defendant. The receipt is proved by an account between the testator, in behalf of his son, the plaintiff, with the estate of Mary Dewitt; and it is evident that Henry Dewitt must have died before his wife Mary.

It cannot be pretended, if the testator was entitled in his own right to the share of his wife in her mother's personal estate, that his ignorance of his rights, and receiving that share as for his son, will give the plaintiff a legal right to call the representative of his father to an account for what he had a right to receive and retain. That the husband surviving his wife is entitled to all her choses in action, as well as to her personal estate in possession, cannot be controverted. The 16th section of the Act concerning executors and administrators, and the distributions of intestate's estates (1 Rev. Laws, 539), enacts, that nothing contained in that act shall be construed to extend to the estates of femes covert that shall die intestate; but that their husbands may demand and have administration of their rights, credits, and other personal estate, and recover and enjoy the same, as fully as they might have done before the passing of the act. It is a transcript of the 29 Car. II. c. 3, sec. 25; and in the case of Squib v. Wyn, 1 P. Wms. 381, Lord Chancellor Cowper held, that even a term, which is a chattel real, shall go to the husband surviving his wife. In the case of Cart v. Rees, 1 P. Wms. 381, a wife died possessed of choses in action, and the husband survived, and died without taking out letters of administration to his wife, after which the next of kin of the wife administered to her; and Lord PARKER held that the administrator of the wife was but a trustee for the executor of the husband, the right of the wife's choses in action being, by the statute of distributions vested in the husband, as next of kin to the wife. Lord HARDWICKE lays down the same principle in Elliot v. Collins, 3 Atk. 527. He says, the husband surviving the wife, her whole estate vested in him at the time of her death, and no person could possibly be entitled to the rights of the wife but himself, so that her whole property belonged to him. Hargrave and Butler's note to Coke Littleton (note 304), after stating the statutes of distribution, they observe upon the construction of these statutes, it has been held that the husband may administer to his deceased wife; and he is entitled, for his own benefit, to all her chattels real, things in action, trusts, and every other species of personal property, whether actually vested in her and reduced into possession, or contingent and recoverable only by action or suit; and that by a series of cases it is now settled that the representative of the husband is entitled as

much to that species of his wife's property as lies in action or suit; and is not reduced into possession, as to any other; and that the right of administration follows the right of the estate, and ought, in case of the husband's death, after the wife, to be granted to the next of kin of the husband; and if obtained by a third person, he is a trustee for the representative of the husband. Bacon's Abridgment (tit. Baron & Feme, C.) contains a note by Mr. Gwillim to the same effect; and Christian, in his note to 2 Black. Com. 435, gives the same construction to 29 Car. II. c. 3, sec. 25, that the husband shall have administration of all his wife's personal estate, which he did not reduce to possession before her death, and shall retain it to his own use; and, in case of his death before administration granted to him, or it be recovered, the right to it passes to his personal representatives, and not to the wife's next of kin.

It may be added, that there is not an authority to be met with contradicting these well and clearly established principles.

The plaintiff rests his right to recover on the ground that the testator received money to which the plaintiff is entitled; and the only count in the declaration on which he can recover is the one for money had and received. Should it, therefore, be admitted that, as the testator did not take out letters of administration on the estate of his wife, he is to be regarded as only equitably entitled to the money he received, this equitable right is in this action sufficient to protect the defendant from any responsibility; for it cannot be questioned that, in the action for money had and received, the defendant may make any defence which shows that the plaintiff, ex æquo et bono, is not entitled to Great stress has been placed on the terms of the receipt; and that it appears the testator meant to receive the money for his son, the plaintiff. I consider this as furnishing no legal or equitable title to the plaintiff to sue for the money thus received, if the defendant has otherwise a right to retain. The amount of the argument is this: the defendant's testator received his own money, or money to which he was entitled, for the plaintiff; and in this action, in which the plaintiff is bound to show that the money so received was his, or that he was equitably entitled to it, he shows directly the reverse, and that it was his father's. It cannot be pretended that the receipt operated as a transfer of the property from the father to his son.

It was a mere muniment of evidence, and worked no change in the right to the money.

I cannot, however, assent to the position that the plaintiff has even a technical legal title to the money received by his father. The administration given by the statute to the husband who survives his wife cannot be necessary to entitle him to the beneficial use of what he recovers.

It merely confers a right to sue for her choses in action; and if he can get them without suit, his title is as perfect as though he had taken letters of administration. The statute expressly provides that nothing contained in it shall extend to the estate of femes covert, and consequently the plaintiff cannot claim under this statute; it recognizes the common-law right of the husband to recover and enjoy the personal estate of his deceased wife.

The equitable rights of the husband or his representatives will arise, should letters of administration be taken out on her estate by any other than the husband or his personal representatives. The legal title to recover the choses in action of the wife would then reside in such administrator, and the equitable right to them in the husband or his representative. The construction of the statute must be the same in law as in equity; and it cannot be maintained that, when it gives the right in the deceased wife's personal estate to her husband, and gives him the right of administration, that any other person has a legal title against the husband. Baron Comyns, in his Digest (tit. Baron & Feme, E. 3) lays down the law to be, that, if the husband dies without administering to the personal estate of his wife, it goes to his representative, and is vested in him before administration taken out, and not to her next of kin; and he takes the distinction I have mentioned, that if administration is granted to such next of kin, yet in equity he is looked on as a mere trustee for the representatives of the husband. Upon no principle can the plaintiff recover, and the defendant must have judgment.

Judgment for defendant.

That, in the absence of statutory provisions to the contrary, the husband is entitled to administer on the estate of his deceased wife, is well settled. "If his wife dies, and he survives her, before he has reduced the chose in action to possession, it does not strictly survive to him; but he is entitled to recover the same to his own use by acting as her administrator. By the statute of distri-

butions of 22 and 23 Charles II., and the 25th section of the statute of 29 Charles II. c. 8. in explanation thereof, and which have, in substance, been reenacted in New York and the other States of the Union, the husbands of femes covert who die intestate have a right to administer upon their personal estate, and to recover and enjoy the same. Under the statute, it is held that the husband is entitled, for his own benefit, jure mariti, to administer, and to take all her chattels real, things in action, and every other species of personal property, whether reduced to possession, or contingent, or recoverable only by suit. But if the wife leaves choses in action not reduced to possession in the wife's life, the husband will be liable for her debts dum sola to that extent; for those choses in action will be assets in his hands." 2 Kent's Com. 135, citing Heard v. Stamford, 3 P. Wms. 409, s. c. Ca. temp. Talb. 173; 2 Eq. Cas. Abr. 134, pl. 5. See also Hetrick v. Hetrick, 18 Ind. 44; 2 Kent's Com. 409, 410; Schouler's Dom. Rel. 158 et seq.; Reeves's Dom. Rel. *12-19; 3 Redf. on Wills, 80; 1 Bish. Mar. Wom. §§ 172 et seq.; McCosker v. Golden, 1 Bradf. 64; Barnes v. Underwood, 47 N. Y. 351.

The case of Heard v. Stamford (supra) well illustrates the last proposition of the above quotation, and also the liability of the husband in general for his wife's debts, and is therefore incorporated in this note.¹

1 "A feme sole was indebted to her sister in 50l. by note; she married, and brought a personal estate to the value of 7001. to her husband, with whom she lived about a year and a quarter, and then died; the creditor by note never recovered judgment against the husband and wife, and the debt remained unpaid. The husband, on the wife's death, administered to the wife. The sister married, and with her husband brought a bill against the defendant, and finding that the choses in action, of which the wife died possessed, were not sufficient to pay the 501. debt; which the wife owed dum sola; it was prayed that the defendant, the husband for so much as he had received out of the clear personal estate of the wife upon his marriage, should be made liable to answer the plaintiff's demand.

"And it was insisted to be but common reason and justice that, as the wife was the owner of a visible estate, upon the credit of which the plaintiff might have intrusted her; so he that

had such estate should pay the debt, which he might well afford to do; that it would be a case full of hardship, if a feme sole, who in ready money, goods, jewels, terms for years, &c. might be worth 10,000*l*. and might owe 1,000*l*., if such woman should afterwards marry and die, that on her death her husband should go away with the 10,000l. and not be obliged to pay one farthing of his wife's debt, this would prove of the most pernicious consequence to the creditors; whereas, on the other hand, the husband would have no reason to complain of being liable to answer their demands, as far as he had received a fortune with his wife; that the author of a book, entitled 'The Office of Executors' (a book well esteemed), chap. 17, touching a feme covert's being executrix, takes notice of this case as a very hard one, and indeed recommends it as proper for the consideration of a Court of equity; that accordingly the Court has granted relief under such circumstances, as appears from the Chancery

Reports, 205, Freeman v. Goodham, where a feme dum sola bought goods, but did not pay for them, and afterwards married and died, having brought a good portion, which came to the hands of her husband, who, on the creditors filing a bill against him to be paid for the goods, demurred. The Lord Chancellor Nottingham overruled the demurrer, saying, with some earnestness, that he would alter the law in that point. So in the case of Powell v. Bell, Abridgment of Cases in Equity, 16, Precedents in Chancery, 256, it was decreed that the wife who had contracted debts dum sola, being dead, the husband should account for what he had received with her, and should be so far liable to her debts; and there Mr. Vernon is said to have informed the Court, that he had often known it so held. moreover insisted, that one precedent relieving a creditor was more to be regarded than three to the contrary.

"LORD CHANCELLOR. It is extremely clear that, by law the husband
is liable to the wife's debts only during
the coverture, unless the creditor recovers judgment against him in the
wife's lifetime; and I do not see how
any thing less than an act of Parliament can alter the law. The wife's
choses in action are assets, and will be
liable, but these, it seems, are not sufficient in the principal case to answer
the demand. In the case of Freeman
v. Goodham, there was some reason

(a) From a marginal note, it appears that in this case (the proper style of which is Freeman v. Goodland), there was subsequently made, on the hearing of the cause, a decretal order against the defendant by consent, "so that, this being a decree in consequence of the defendant's offer, here

for the Court to be provoked, when the goods themselves continued after the death of the wife in the hands of the husband, who, notwithstanding, refused to pay for them. It is true, it appears the then Lord Chancellor overruled the demurrer; but what was done afterwards, what decree his Lordship made, whether the cause was ever heard, or whether the bill was not dismissed, does not appear (a). Neither in the case of Powell v. Bell, is any notice taken what estate the wife had in her own right, and what as administratrix to her former husband.

"If I relieve against the husband because he had sufficient with his wife wherewith to satisfy the demand in question; by the same reason, where a feme indebted dum sola afterwards marries, bringing no fortune to her husband, and judgment is recovered against the husband, after which the wife dies, by the same reason (I say) I ought to grant relief to the husband against such judgment, which yet is not in my power; consequently, there can be no ground for a Court of equity to interfere in the present case. the law as it now stands be thought inconvenient, it will be a good reason for the legislature to alter it; but, till that is done, what is law at present must take place.

"The next morning the case of the Earl of Thomond v. Earl of Suffolk [vol. 1, 470] was cited to have been adjudged by the Lord Macclesfield,

appears to be no express determination in the point; however, it is very probable that the defendant, perceiving which way the opinion of the Court inclined on arguing the demurrer, was induced to make the above-mentioned offer."

wherein this was one of the very points in question; and the Lord MAC-CLESFIELD, for much the same reasons as had been given by the Lord TALBOT, denied to relieve a creditor of the wife dum sola, against the husband who survived, and on the marriage had sufficient personal estate wherewith to answer her debts. Whereupon the Lord Chancellor took notice that, although the matter now in question was inconsiderable in value, yet the case itself was of great consequence; for which reason, if the counsel for the plaintiff were dissatisfied, he would, he said, hear them again to it. But the above-mentioned case of the Earl of Thomond being insisted on as in the very point, the counsel acquiesced, and did not stir the matter again."

"Note; the same point had been determined by the Lord King in the case of Jordan v. Foley, Trin. 11 G.I." See this case explained in Adair v. Shaw, 1 Sch. & L. 263.

This note cannot be better concluded than by transcribing therein Mr. Butler's note on this subject to Coke upon Littleton, Co. Litt. 351 a, note 1, the substance of which may also be found adopted in the opinion of the Court in Judge of Probate v. Chamberlain, 3 N. H. 129.

"At the common law no person had a right to administer; it was in the breast of the ordinary to grant administration to whom he pleased till the Statute of 21 Henry VIII., which gave it to the next of kin; and, if there were persons of equal kin, whichever took out administration first was entitled to the surplus.

"The statute of distribution was made to prevent this injustice, and to oblige the administrator to distribute. In those cases, where the wife was entitled only to the trust of a chattel real, or to any chose in action or contingent interest in any kind of personalty, it seems to have been doubted, whether, if the husband survived her, he was entitled to the benefit of it or not. See the commentary on sect. 665, and 4 Inst. 87; 1 Roll. Abr. 346, All. 15; Wytham v. Waterhouse, Cro. Eliz. 466, 8 Rep. in Ch. 87; and Gilb. Cas. in Eq. 234.

"By the 22 & 23 Car. II., c. 10, administrators are liable to make distribution; but as the act makes no express mention of the husband's administering to his wife, and as no person can be in equal degree to the wife with the husband, he was not held to be within the act.

"To obviate all doubts upon this question, by the 29 Car. II., c. 3, § 25, it is declared that the husband may demand administration of his deceased wife's personal estate, and recover and enjoy the same, as he might have done before the Statute of the 22 and 23 of that reign.

"Upon the construction of these statutes, it has been held that the husband may administer to his deceased wife, and that he is entitled for his own benefit to all her chattels real, things in action, trusts, and every other species of personal preperty, whether actually vested in her and reduced into possession, or contingent or recoverable only by action or suit. It was, however, made a question, after the Statute of 29 Car. II., c. 3, § 25, whether if the husband having survived his wife, afterwards died during the suspense of the contingency upon which any part of his wife's property depended, or without having reduced into possession such of her property as lay in action or suit, his representative, or his wife's next

of kin, were entitled to the benefit of it. But, by a series of cases, it is now settled that the representative of the husband is entitled as much to this species of his wife's property as any other; that the right of administration follows the right of the estate, and ought, in case of the husband's death

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after the wife, to be granted to the next of kin of the husband (see Mr. Hargrave's Law Tracts, 475); and if administration de bonis non of the wife is obtained by any third person, he is a trustee for the representative of the husband. See Squib v. Wyn, 1 P. W. 378; Cart v. Rees, cited id. 381."

IDIOCY, LUNACY, ETC.

MITCHELL v. KINGMAN.

(5 Pick. 431. Supreme Judicial Court of Massachusetts, 1827.)

Contracts of Insane Persons. — Appearance.

Assumpsit upon a promissory note. The defendant, by his attorney, pleaded the general issue.

At the trial, in the Court of Common Pleas, the plantiffs having produced the note and proved the defendant's signature, the defendant offered to prove that at and before the making thereof he was, and ever since has been an idiot and incapable of making a valid contract; but WILLIAMS, J., ruled that he was not by law entitled to this evidence. The jury having found a verdict for [the plaintiffs the defendant filed his exceptions to this direction.¹

The opinion of the Court was delivered at this term by

WILDE, J. The principal question in this case, namely, whether a person non compos mentis can be allowed by law to plead his disability in avoidance of his contracts, is certainly a question of some difficulty. It is said to be a maxim of the common law, that no man of full age shall be allowed by plea to stultify himself, and thereby to avoid his own deed or contract. This is affirmed by Lord Coke in Beverley's case, 4 Co. 123, and also in his commentary on Littleton (Co. Lit. 147); and since his time seems to have been generally admitted as a settled principle, but without much consideration.

On the other hand, Fitzherbert denies that this was ever a maxim of the common law. And Britton and Bracton maintain the same opinion. This opinion is likewise supported by the case referred to by Fitzherbert; and by the form of the writ in the Register. The words are, "Dum fuit non compos mentis suæ ut dicit," &c.

¹ Arguments of Counsel are omitted. — [ED.]

Blackstone says (2 Com. 291) that the notion that a man should not be permitted to disable or blemish himself first began to arise in the reign of Edward III.; and it was as late as the reign of Henry VI. before it was sanctioned by any judicial de-It would seem, therefore, that Lord Coke was not termination. correct in saying that the maxim in question was a rule of the common law. In a question relating to the ancient common law, it seems to me that the authority of the Register should be admitted as conclusive, especially where other sources of information are doubtful and contradictory. But few decided cases on this point are to be found since the case of Beverley. But it was decided as late as the year 1737, in the case of Yates v. Boen, 2 Str. 1104, that lunacy might be given in evidence to avoid a contract. This was a case of a debt on articles and upon non est factum pleaded, the defendant offered to give lunacy in evidence. The Chief Justice (LEE) at first thought it ought not to be admitted, upon the rule in Beverley's case; but on the authority of Smith v. Carr, in which it was admitted by Chief Baron Pengelly, and the case of Thompson v. Leach, 2 Ventr. 198, he suffered it to be given in evidence. This case is cited with approbation by Buller (Buller's N. P. 172); and also in the case of Webster v. Woodford, 3 Day, 90; in which it was decided, after a full examination of the question, that a person non compos mentis might be permitted to plead his own disability in avoidance of his contract.

It appears therefore, on examination, that the supposed maxim of the common law, relied on by the plaintiffs, is of doubtful origin and authority. Nor should we feel ourselves bound to adopt it, although it were supported by less questionable English authorities, because the property and interests of idiots and lunatics are not protected here, as they are in England, by the royal prerogative. There, if an idiot alien his lands, the king, after office found, may, upon scire facias against the alienee, recover the lands to the use of the idiot, and thereupon they will revest And so if the idiot be sued in any action upon a bond or other contract, the king, by his writ, shall send a supersedeas to the justices where the suit is commenced. And the law is the same when a person becomes non compos. Beverley's case, But even in England there seems to be neither rea-4 Co. 126. son nor necessity for adopting the rule in question; a rule which,

Fonblanque says, was adopted "in defiance of natural justice, and the universal practice of all the civilized nations in the world." 1 Fonbl. Eq. 46. That it is against natural justice is manifest; because a man in a fit of insanity may make a contract, which, after the recovery of his reason, might be enforced against him under the rule, although made without consideration, provided it be under seal. For neither in England nor here can a committee or guardian be appointed to a lunatic or insane person, after the recovery of his reason. If, therefore, in such a case, the defendant could not avoid the deed by pleading his insanity at the time of the contract, he would be without defence; and thus by the visitation of Providence, followed up by a rule of law, a man without fault might be despoiled of his property and utterly ruined.

It is said that the rule, however unjust its operation may sometimes prove, is nevertheless founded in public policy. law does not proceed, says Powell, upon the ground that the party is bound; for that cannot be, seeing that, by the law of nature, he wants the capacity to assent to a contract; but because the policy of the law, which rather submits to a particular mischief than a public inconvenience, sets bounds to the law of nature in point of form and circumstance. Pow. Contr. 21. But if this reason were allowed, and applied generally, the course of justice would be obstructed at every step, and Courts of law would be worse than useless; for there are many other frauds much easier to practise than that of counterfeiting insanity. But a party is not to be deprived of a just defence, because he may by possibility practise fraud and imposition. We might as well reject all human testimony because witnesses may be perjured. But admitting that insanity might be easily feigned (which, however, is not the fact), we see no reason why the law should interfere in favor of a party who had contracted with a person believing him to be insane. It would seem to be a more enlightened policy to discourage the making of contracts under such circumstances, rather than to facilitate the means of enforcing them.

We are of opinion, therefore, that the Court of Common Pleas erred in rejecting the evidence offered by the defendant at the trial. He offered to prove that, at and before the making of the note declared on, he was and still continued to be an idiot, and incapable of making a valid contract. If the fact were so, then the Court were bound to appoint a guardian ad litem. But if he was at the time of the trial restored to his reason, then he might plead his former disability by attorney, or might prove it under the general issue. The rules of practice in chancery, as laid down by Mitford, seem to us to be founded in good sense, and to be well adapted to the ordinary administration of justice. When a bill is filed against an idiot or lunatic, the committee of his estate, if there is one, must be made defendant with him. Mitf. Pl. 24.

And he must defend by his committee, who is by order of the Court appointed a guardian for that purpose as a matter of course. But if he has no committee, or the committee has an interest adverse to his, another person may be guardian for the purpose of defending the suit. So if a person who is in the condition of an idiot or lunatic, though not found such by inquisition, is made a defendant, the Court upon information of his incapacity will appoint a guardian. Ibid. 82.

It is said truly, that, if the defendant was non compos at the time of the trial, he had no right to appear and plead by attorney. But, if it should appear on examination that he is still non compos, the plea by attorney may before judgment be treated as a nullity; and a guardian will be appointed, who will be entitled to plead de novo.¹

For this purpose the verdict is to be set aside, and a new trial granted at the bar of this Court.²

ALLIS v. BILLINGS.

(6 Met. 415. Supreme Judicial Court of Massachusetts, 1843.)

Whether the Deed of a Person non compos mentis is voidable.

Writ of entry to recover seven acres of land in Hatfield. At the trial, the tenant gave in evidence a deed from the demandant, dated March 25th, 1835, conveying the demanded premises, and several other parcels of land, being the farm and outlands be-

¹ See Revised Stat. c. 98, § 22.

² See Baxter v. Earl of Portsmouth,

2 Carr & Payne, 178, and note.

longing to the demandant, whose previous title, by devise from his father, was admitted. The consideration of said deed was a note, given to the demandant by the tenant, and a surety, for \$4,600, payable in six years, with yearly interest. On this note were sundry indorsements, reducing it to about \$3,000. Some of these indorsements were in the handwriting of the tenant, and some in that of the demandant. The demandant did not offer to return the note or the money received.

The tenant sold the said farm, and part of said outlands, for a sum somewhat exceeding \$5,000; and a writ of entry was commenced against his grantee, by the demandant, to recover the same; which writ was returnable at a term subsequent to that at which the present action was tried.

It appeared that the tenant went into possession under said deed, and was in possession of the demanded premises when this action was commenced, claiming title thereto under said deed.

The demandant, to avoid the effect of the said conveyance to the tenant, offered to prove that he was insane when it was executed by him, and also that it was obtained by undue influence. The evidence which he introduced tended to show that he had been insane and sane at different times for a number of years prior to the making of said conveyance; and, also, since.

The tenant requested the judge who tried the cause, to instruct the jury, "that if the demandant was subject only to temporary turns of insanity, and insane when he made the deed, yet if, after he became sane and when sane, he did acts in affirmation of the contract, as by receiving payments on the note, and the like, he could not afterwards maintain an action to avoid the deed on the ground of insanity; that, as between the present parties, this action could not be maintained for one of several parcels described in the deed, and remaining in the possession of the tenant; and that the demandant, to maintain his action, should return the note and the money received."

The judge instructed the jury, that, if they were satisfied that the demandant was not of sane mind when he made the deed, it was void absolutely, and not voidable merely, and that the receipt of money on the note would not bar an action, though the demandant was sane at the time he received it; that it was not necessary for him to return the note or money received, under the circumstances of this suit; and that the demandant was not

obliged to demand in this action all the parcels in the possession of the tenant and unsold.

The jury found that the deed was made when the demandant was insane, and they did not consider the allegation of fraud.

New trial to be granted, if the ruling of the judge was incorrect; otherwise, judgment to be rendered for the demandant, on the verdict.

Huntington, for the tenant.

Wells and Forbes, for the demandant.

DEWEY, J. The question raised in the present case is, whether the deed of one who is insane, at the time of the execution thereof, is void absolutely, or merely voidable.

The term "void," as applicable to conveyances or other agreements, has not at all times been used with technical precision, nor restricted to its peculiar and limited sense as contradistinguished from "voidable," it being frequently introduced, even by legal writers and jurists, where the purpose is nothing further than to indicate that a contract was invalid, and not binding in law. But the distinction between the terms "void" and "voidable," in their application to contracts, is often one of great practical importance; and whenever entire technical accuracy is required, the term "void" can only be properly applied to those contracts that are of no effect whatsoever; such as are a mere nullity, and incapable of confirmation or ratification.

This question, then, arises: Is the deed of a person non compose mentis of such a character that it is incapable of confirmation? This point is not now for the first time raised, but has been the subject of comment both by elementary writers and in judicial opinions. Mr. Justice Blackstone, in his Commentaries, vol. ii. p. 291, states the doctrine thus: "Idiots, and persons of non-sane memory, infants and persons under duress, are not totally disabled to convey or purchase, but sub modo only, for their conveyances and purchases are voidable, but not actually void."

Chancellor Kent says: "By the common law, a deed made by a person non compos mentis is voidable only, and not void." 2 Kent, Com. 4th ed. 451. In Wait v. Maxwell, 5 Pick. 217, this Court adopted the same principle, and directly ruled that the deed of a non compos, not under guardianship, was not void, but voidable. Such a deed conveys a seisin to the grantee, and the deed, to that extent, is valid, until, by entry or action, the

same is avoided. Mitchell v. Kingman, 5 Pick. 431, is to the like effect. In Seaver v. Phelps, 11 Pick. 305, the contracts of insane persons are noticed as contracts not absolutely void, but voidable.

It may seem somewhat absurd to hold that a deed should have any effect when wanting in one of the essential elements of a valid contract; viz., that of parties capable of giving an assent to such a contract. But this objection as strongly applies to cases of deeds executed by infants, who are alike wanting in capacity to make a binding contract. Yet this principle of giving so much effect to the contract as removes it beyond that of a mere nullity, and renders it to some present purposes effectual and susceptible of complete future ratification, is well settled and understood as to infants who enter into contracts; and it will be found that there is a common principle on this subject, alike applicable to the inability of a contracting party, arising from lunacy or infancy. The civil and the common law writers group together idiots, madmen, and infants, as parties incapable of contracting for want of a rational and deliberative consenting 1 Story on Eq. § 223, and authorities there cited.

It is true that the rule of the common law, as held at one time, seemed to sanction, in one particular, a most unwarrantable distinction between the cases of deeds made by persons non compos, and those made by infants; holding that the former could not be avoided by the party, upon the ground that no man of full age should be admitted to stultify himself, although it allowed privies in blood, or privies in representation after the death of the non compos, to avoid the deed, on the ground of incapacity in the grantor. This distinction has not been adopted by our Courts. On the contrary, we hold that such conveyance by one non compos mentis may be avoided by himself, as in the case of an infant grantor. This principle was directly recognized in Mitchell v. Kingman, 5 Pick. 431. Indeed, the English rule has, in modern times, been often questioned in England; and in the Courts of our sister States, it has received little if 1 Story on Eq. § 225, and cases there cited. any sanction.

It was urged by the demandant's counsel that the doctrine, that the deed of a non compos person was voidable only and not void, was to be limited to feoffments or cases where there is a livery of seisin or what is equivalent, and would not embrace a

conveyance by an unrecorded deed. But we do not think that such a distinction can be maintained. As between the grantor and grantee, such unrecorded deed is good and effectual, by force of our statute; and the effect of such a conveyance would be to vest the title of the grantor in the grantee immediately upon the execution of the deed, and before the same is recorded. Marshall v. Fisk, 6 Mass. 31. A deed made in proper form, and duly acknowledged and recorded, is, in this commonwealth, equivalent to a feoffment with livery of seisin. Somes v. Brewer, 2 Pick. 197. Without the registry, where the delivery of the deed is accompanied by the surrender of the possession of the conveyed premises to the grantee, the effect would be the same, as to the conveyance by a non compos, as would result from a feoffment made by him. A deed of bargain and sale, it is said, places the grantee upon the footing of a feoffment, as it passes the estate by the delivery of the hand; such grants or deeds as take effect by delivery of the hand being voidable only. Somes v. Brewer, 2 Pick. 197; Zouch v. Parsons, 3 Burr. 1804 [ante, p. 3]. We come, therefore, to the result that the deeds of infants and insane persons are alike voidable, but neither are absolutely void.

Upon the trial of the present action, the plaintiff put his case upon two distinct grounds: 1st. That he was insane at the time he executed the deed under which the tenant derives his title; 2d. That the deed was obtained by undue influence and fraud on the part of the tenant. Upon both these points the plaintiff introduced evidence. What was the extent of the evidence upon the latter ground, and what would have been the finding of the jury upon that point, we have no means of judging. This was a distinct and independent ground, and one which, if found in favor of the demandant, might have been decisive of the case, but which, in the final disposition of the cause, was not considered or passed upon by the jury.

All the evidence, therefore, bearing upon this point, is now to be treated as if never offered, and the sole inquiry for our consideration is, whether the instructions of the Court were such, in matter of law, that the verdict may be maintained, taken as it was upon the first ground solely. The presiding judge ruled, as a matter of law, that a deed of an insane person was absolutely void. Under this ruling, all that was required of the

demandant to entitle himself to a verdict in his favor, was to show a temporary insanity at the time of the execution of the No matter what might have occurred subsequently, or how soon afterwards the demandant might have been restored to a sound mind; no matter what acts of confirmation may have been done by him, or however fully he may have adopted and ratified the transaction, by the receipt of the money or other valuable consideration paid for the land; still the legal title to the land would be in him. This was the necessary result of the doctrine, that the deed of a non compos was absolutely void, while, if it had been held only voidable, these subsequent acts of the party might materially affect the verdict of the jury. adopting, as we do, the principle that the deed of an insane person is only voidable, this, while it gives the insane grantor full power and authority to avoid his deed, and thus furnishes full protection to him against all acts injurious to his interests, done while he was non compos, also entitles the other party to set up the deed, if he can show a ratification or adoption of it by the grantor, after he is restored to a sound mind. If the grantor, when thus capable of acting, and with full knowledge of his previous acts, and of the nature and extent of them, will deliberately adopt and ratify them; if he will knowingly, and in the exercise of his proper faculties, take the benefit of a contract made while he was insane,—it is competent for him to do so. But the consequence will be, to give force, effect, and legal validity to his contract, which was before voidable.

In the present case, therefore, upon the point first relied upon in the defence, viz., that the demandant was insane when he executed the deed, the jury should have been instructed that this fact, if established, rendered the deed voidable, and that it was competent for the demandant to avoid it on that ground, if not estopped by his subsequent acts, done whilst in his right mind; but that a voidable deed was capable of confirmation; and that, if the grantor, in his lucid intervals, or after a general restoration to sanity, being then of sound mind, and well knowing and understanding the nature of the contract, ratified it, adopted it as a valid contract, and participated in the benefits of it by receiving from the purchaser the purchase-money due on the contract, this would give effect to the deed, and render the same valid in the hands of the grantee, and would thus become

effectual to pass the lands, and divest the title of the grantor. Such instructions would have presented the question in issue in a different aspect to the jury, and might have led to a different result upon the only point upon which they passed.

Verdict set aside, and a new trial granted.

Thompson v. Leech.1

(8 Salk. 800, s. c. 2 Salk. 427, 565, 576, 618, 675; 8 Mod. 301; 12 Mod. 173; Holt, 357, 623; Comb. 438, 468; Freem. 508; 1 Ld. Raym. 313; Shower's Cases in Parl. 150; Carth. 435. Court of King's Bench, 1698.)

Where the Acts of an Idiot are void, and where voidable.

SIMON LEECH being tenant for life, remainder in tail to his first son, remainder to Sir Simon in tail, surrendered to Sir Simon, and afterwards had issue a son; and it was found that the father was non compos when he made this surrender.

It was insisted that this surrender was not void, but only voidable; for as to himself he cannot avoid it by entry or by pleading, or by the writ dum non fuit compos, which writ, being to avoid his own alienation, supposes that he demisit, and so doth the writ de idiota inquirend, and the law needs not prescribe methods to avoid his acts, if they are void in themselves.

But it was answered and resolved per Holt, C. J. That the deed of a person non compos is void, that if he grants a rent, and the grantee distrains for the arrears, he may bring trespass, that his letter of attorney or his bond are void: 't is true, the books say generally, that his deeds or bonds are not void, but that must be understood, as that the obligor cannot plead non est factum, because it appears to be a deed fairly executed, but 't is of no force, because of this latent defect or incapacity, which the law requires should be pleaded, and put in issue specially, and so are all his acts in pais except his feoffments, and livery and seisin, and those are only voidable; the reason is, because of the respect the law gives to a feoffment upon the account of

¹ The report of this case here given is that found in 3d Salk. 300, commencing at the bottom of the page.

The defendants' name is variously spelled "Leech" and "Leach" in the various reports.

its solemnity in the transmutation of a freehold; and the writ de non compos mentis, which says demisit, that must be understood of a feoffment or a fine, those being the ancient and the only conveyances at that time: an infant runs paralleled with an idiot in all cases but this; viz., that an idiot is not admitted to disable or stultify himself. And lastly, his deeds are void, because the law hath appointed no act to be done for the avoiding them; therefore this deed of surrender being void, the particular estate for life was not determined by it, and by consequence the contingent remainder not destroyed.

The Attorney-General exhibited a bill in equity against the defendant, to make him accompt to a lunatic, and to avoid a bargain made by him, and this was held good, tho' the lunatic was no party, for though 't is generally true, that he ought to be made a party, yet not in this case, because it would be to stultify himself.

But where a bill is brought in the nature of an information by the Attorney-General in behalf of a lunatic, there he ought to be made a party, if 't is not directly to stultify himself, as in the case of an infant, for he may recover his understanding, and then he is to have his estate at his own disposal. *Vide* Fearne on Contingent Remainders.

IN RE ESTATE OF SARAH DESILVER.

(5 Rawle, 111. Supreme Court of Pennsylvania, 1835.)

Feoffment and Livery of Lunatic voidable: Deed of Bargain and Sale void.

This case came before the Court on a writ of error to the Court of Common Pleas of Philadelphia county, in which it was a traverse of an inquisition of escheat, of the estate of Sarah Desilver, deceased, taken on the 12th of November, 1829, and filed with the proceedings of the inquest on the 13th of November, 1829. The traverse was filed by the Rev. Thomas J. Kitts, and the trustees of the Second Baptist Church and congregation in Philadelphia.

The inquest found that Sarah Desilver died on or about the 22d of June, 1828, intestate, without heirs or any known kindred and that she was at the time of her death seised and possessed of certain real estate, in the county of Philadelphia, particularly described in the inquisition, and that Thomas J. Kitts, of the said county, was the person in whose hands or possession the real estate then was.

Various pleadings took place in the Court of Common Pleas, but by writing filed, dated the 6th of March, 1833, it was agreed that the pleadings should be withdrawn; and that every material fact found in the inquisition should be understood to be traversed, and the case tried as if a formal issue had been joined according to the agreement.

On the trial, after the counsel of the traversers had given in evidence the death of Sarah Desilver, a paper writing, purporting to be the last will and testament of the said Sarah Desilver, dated the 8th of December, 1824, and proved the 26th of July, 1828, devising part of the property mentioned in the inquisition to "the trustees of the Second Baptist Church and congregation in the city of Philadelphia, under the ministry of the Rev. Mr. Kitts, and their successors in office forever, for the use of said church, and the residue thereof to Thomas J. Kitts, in feesimple;" and an instrument, purporting to be a deed, dated the 24th of August, 1825, acknowledded the 30th of August, 1825, and recorded the 28th of October, 1825, from Sarah Desilver to Thomas J. Kitts, conveying the said estate to Kitts in feesimple, provided that the rents, issues, and profits of the whole estate should, after the payment of ground rents, taxes, and the necessary repairs, be by him, his heirs, administrators, and assigns, well and truly applied to the use of the said Sarah Desilver during her natural life, and provided also that, immediately upon her decease, he, his heirs or assigns, should make or cause to be made and executed unto the trustees of the Second Baptist Church, &c., a lawful deed, for a certain part of the property, the same that by the will was given to the church, the counsel for the commonwealth offered to prove that "Sarah Desilver was non compos mentis before, at, and after the alleged signing, sealing, and delivery of the said last will and testament," and that she was "non compos mentis before, at, and after the alleged signing and execution of the deed as aforesaid,

and that the said Sarah Desilver continued to be non compose mentis as aforesaid, unto and until the time of her death, as aforesaid." The evidence thus offered, being objected to by the counsel of the traversers, was rejected by the Court. The counsel of the commonwealth "further offered in evidence the fact, that the said Thomas J. Kitts, for a long time before and until the death of the said Sarah Desilver, acted as, and was her sole agent, and admitted her to be in the possession of the real estate in the said inquisition mentioned and set forth." This evidence was also objected to on the part of the traversers, and rejected by the Court, who sealed a bill of exceptions on both points.

The jury returned a verdict in favor of the traversers, whereupon a writ of error was sued out, on which the record was brought into this Court, where errors were assigned in the rejection by the Court below of the evidence offered on the part of the commonwealth, as above stated.

Rush, H. J. Williams, and Dallas, for the Commonwealth. Grinnell and P. A. Browne, for the traversers.

The opinion of the Court was delivered by

Gibson, C. J. The authorities distinctly show that the feoffment and livery of a lunatic or madman are not void, but voidable; and that as they work a divestiture of his seisin, they preclude the possibility of an escheat by his death, because seisin must be found by the inquest, as well as a failure of heirs, devisees, or known kindred. His feoffee holds discharged, because an avoidance of the act would not restore the seisin of the lunatic, at the time of his death, which is essential to an escheat of his estate to the immediate lord of the fee. It is true that our property is allodial, and that escheats with us take effect, not upon principles of tenure, but by force of our statute to avoid the uncertainty and confusion inseparable from the recognition of title founded in priority of occupancy; yet these statutes equally, and in terms, require the decedent to have been seised at his death.

So far the argument made for the defendant in error seems to be unassailable. The defect in it is, that it fails to prove the deed of bargain and sale by which he holds to be equiavlent in all respects to a feoffment. It is not a feoffment in form or in fact, nor has it all the qualities or consequences of one, as was

determined in M'Kee's Lessee v. Pfout, where it was not suffered to work a forfeiture like the feoffment of a tenant for life. But granting it, as it undoubtedly has by the express words of the statute, the force and effect of a feoffment and livery, for the purpose of "giving possession and seisin, and making good the title and assurances," yet, in order to do so, it must be a deed; for the legislature certainly never intended to impart the prescribed effect to an act in pais which should at the same time be a nullity. At common law the feoffment of a madman, as shown by the argument, is only voidable, but his deed is absolutely void; so that, unless we can infer a legislative design to alter the common law in the latter particular, we must hold that his conveyance by bargain and sale is void, and unattended with the consequences attempted to be attributed to it. This design could be inferred, but from the clause which gives a deed of bargain and sale the force and effect of a feoffment in "making good the title and assurance." But, in that respect, it must in M'Kee's Lessee v. Pfout have created a tortious fee in the grantee, and produced a forfeiture of the grantor's life estate; a consequence which was denied to it. The obvious purpose of the provision was to dispense with actual investiture, without imparting to its substitute the feudal and almost inconceivable effect of displacing lawful estates and turning them to a mere right; or giving to it any quality or consequence beyond the one specified. The object was to give without the aid of feudal ceremonies the legal seisin for lawful purposes.

In treating the conveyance, therefore, as an actual feoffment, which transferred the seisin without regard to the sanity of the grantor, the judge who tried the cause gave it an effect never intended to be imparted to it. The capacity of the Commonwealth to contest its validity, was settled in Crawford v. The Commonwealth, 1 Watts, 484, where she was adjudged to be the ultima hæres; and, succeeding as such to the rights and remedies of the heir and next of kin, she may, on the strictest principles of the common law, be let in to show the grantor's insanity.

Judgment reversed, and a venire de novo awarded.

¹ 3 Dallas, 486. See also Rogers v. Walker, 6 Penn. St. 374.

CARRIER v. SEARS.

(4 Allen, 836. Supreme Judicial Court of Massachusetts, 1862.)

Whether Contracts of Insane Persons are voidable or void.

HOAR, J. This action is by the indorsee of a promissory note against the maker; and the defendant offered to prove that the plaintiff procured the indorsement by undue influence from the payee, when he was of unsound mind and incapable of making a valid indorsement. This evidence was rejected, and we think it ought not to have been admitted. An indorsement is a contract; and the contract of an insane person, or one obtained by fraud or duress, is voidable and not void. 2 Bl. Com. 291; 2 Kent, Com. 6th ed. 451; Seaver v. Phelps, 11 Pick. 304; Allis v. Billings, 6 Met. 415; Arnold v. Richmond Iron Works, 1 Gray, 434; Gibson v. Soper, 6 Gray, 279. The right to avoid it is a personal right, which can only be exercised by the insane person, or his guardian, or representatives. The contract is binding upon the party who is of sound mind, and his rights under it are not affected until it is avoided by the party entitled to disaffirm it. The property passes as to third persons.

The only case cited by the defendant upon this point is Peaslee v. Robbins, 3 Met. 164. That was an action upon a note by an indorsee against the promisor, and evidence was offered tending to prove that the payee, when he indorsed the note, had not sufficient mental capacity to make a valid transfer To establish this, evidence was admitted as to his incapacity at the time the note was made to him, as well as after; and the admissibility of this evidence was the question raised upon the bill of exceptions. This Court held that it was admissible, as tending to show his state of mind at the time he indorsed it. Whether his want of mental capacity was a defence of which the defendant could avail himself does not appear to have been questioned by either party or by the Court. WILDE, in delivering the opinion, says: "The plaintiff is bound to show a legal transfer of the note, by proof of the handwriting of the indorser; and it follows, as a necessary consequence, that

the defendant must be allowed to impeach the plaintiff's title to the note by showing that the indorsement was void. Evidence therefore of the indorser's mental incapacity to make a valid contract, at the time he indorsed the note, was material evidence; and not the less material because the same incapacity existed when the note was signed." These remarks of the learned judge, unexplained, would certainly countenance the position taken by the defendant in the case at bar; and the report, as it stands, does not afford the necessary explanation. The point decided was only that evidence of insanity at one time was competent as tending to prove insanity at a time shortly But the fact in the case was, as I well remember, that after. the defendant had been notified by the guardian of the insane payee not to pay the note to the plaintiff; and the defence was conducted by the guardian for the benefit of his ward. examined the record, and find in the original specification of defence the statement "that said Fletcher, as guardian to said Parker (the payee of the note), claims said note as the property or estate of said Parker." There was no controversy upon this point; and the guardian, having claimed and exercised the right to disaffirm and avoid the indorsement, the only question was upon the mental incapacity of the payee at the time the indorsement was made. The language of the Court was therefore perfectly warranted in its application to the circumstances of the case, as it was presented and understood by the parties, but would require limitation if taken as the enunciation of a general principle.

The other exception stated in the report is equally untenable. . . .

Judgment on the verdict.

BURKE v. ALLEN.

(29 N. H. 106. Superior Court of Judicature of New Hampshire, 1854.)

Indorsement of Promissory Note by Insane Person.

ASSUMPSIT on a promissory note dated January 18th, 1844, for the sum of \$302.75, signed by the defendant, and payable to one Hannah Allen, or order, on demand with interest annually, and by her indorsed to David Allen, the plaintiff's testate. Plea, the general issue.

On the trial the note declared on was produced by the plaintiff, and upon the back of the note was the name of Hannah Allen, in her own handwriting.

On the part of the defendant it appeared that David Allen, the deceased, and Samuel Allen, the defendant, were children of Hannah Allen; that David, for several years prior, and subsequent to the date of the note, acted as an agent of Hannah Allen, receiving and disbursing large sums of money for her and managing the most of her affairs. In the summer of 1848, she was taken to the asylum for the insane by David Allen, and remained there until her decease, about two years afterwards. An administrator has been appointed upon her estate, but he has never called upon the defendant to pay the note in question or authorized him to defend this suit.

There was evidence that Hannah Allen was more or less insane at intervals, as early as the summer of 1847; but she was not at any time under guardianship.

The Court ruled that the defendant could not be permitted to show the insanity of Hannah Allen, at the time of her indorsement of the note, as a defence to the action.

The defendant introduced a witness who testified that in the fall of 1846, he heard David Allen ask Hannah Allen to indorse the note now in suit, and she objected, saying that she did not want Samuel, the defendant, to pay the note; but David said, all he wanted with the note was to raise the money to pay her debts, and that he would give the note back again; that he wanted to pledge it as collateral security.

The Court then permitted the plaintiff to prove the state of the accounts and money transactions between Hannah Allen and David Allen, and down to the summer of 1848, when she was carried to the asylum, in order that the jury might better determine whether the note probably went into the possession of David Allen as agent or owner.

The jury returned a verdict for the plaintiff, which the defendant moved to set aside, because of the ruling of the Court as to the insanity of Hannah Allen, and the admission of the evidence as to the state of the accounts.¹

¹ Arguments are omitted. — [Ed.]

EASTMAN, J. Whatever may have been the doctrine formerly, in regard to insanity as a valid defence against an action upon the contract of a party, it seems to be now well settled that the contracts of idiots and insane persons are, as a general rule, not binding either in law or equity. The rule that a man shall not be permitted to stultify himself is now entirely exploded. Being bereft of reason and understanding, he is considered incapable of consenting to a contract, or doing any other valid act. Yates v. Boen, 2 Strange, 1104; Webster v. Woodford, 3 Day, 90; Thompson v. Leach, 3 Mod. 310; Buller's Nisi Prius, 172; Mitchell v. Kingman, 5 Pick. 481; Seaver v. Phelps, 11 Pick. 804; Lang v. Whidden, 2 N. H. 485; True v. Ranney, 1 Foster, 52. See also Davis v. Lane, 10 N. H. 156.

In Seaver v. Phelps, 11 Pick. 804, which was trover to recover the value of a promissory note pledged to the defendant by the plaintiff when the latter was insane, it was held that it was not a legal defence that the defendant, at the time when he took the pledge, was not apprised of the plaintiff's being insane, and had no reason to suspect it, and did not overreach him, nor practise any fraud or unfairness. The Court said, the fairness of the defendant's conduct cannot supply the plaintiff's want of capacity.

But it appears to be agreed that when goods have been supplied to insane persons, which were necessaries, or which were suitable to their station and employment, and which were furnished under circumstances evincing that no advantage of their mental infirmity was attempted to be taken, and which have been actually enjoyed by them, they are liable in law, as well as equity, for the value of the goods. 2 Greenl. on Ev. § 369, and cases cited.

This exception, however, does not impair the general principle that the contracts of insane persons are invalid; and had the present action been brought against Hannah Allen, the payee of the note, to charge her as indorser, she could have set up insanity at the time of the indorsement, and, if proved, it would have been a good defence. The contract would be one that an insane person would be incapable of making. So far the authorities are all agreed. But can the maker of the note interpose such a defence? Can he be permitted to show, in bar of the suit, that the payee and indorser, was, at the time of the in-

dorsement, insane? If an insane person can do no act whatever that shall bind him or his representatives, as some of the books show, and if all his acts are absolutely void, then it would appear plain that the defence can be set up; for the indorsement could affect nothing in any way. It would be simply a void act. Story, in speaking of persons non compos mentis, says, that it is a rule not merely of municipal law, but of universal law, that the contracts of all such persons are utterly void. Story on Prom. Notes, § 101.

But the authorities generally do not go to that extent, and they treat the contracts of insane persons as voidable, not absolutely void. Seaver v. Phelps, 11 Pick. 305; 2 Greenl. on Ev. §§ 369, 370; Dane v. Kirkwall, 8 Car. & Payne, 679; Richardson v. Strong, 13 Iredell, 106.

In Price v. Barrington, 7 Law & Eq. 254, a quære is suggested, whether a conveyance executed by a lunatic is absolutely void, in the absence of notice and fraud; and the Lord Chancellor, in speaking of the question, says that it is not necessary to pronounce a decision upon the abstract general question, whether, in the present state of the law, a conveyance executed by a lunatic is absolutely void.

There is a distinction to be found, in some of the cases, between the contracts of lunatics and those of insane persons; the term lunatic embracing, in such cases, persons of imbecile mind as well as those of disordered intellect. But that distinction we need not trace, as in the present case the proposition was to show insanity in the payee.

If we are to treat the contracts of an insane person as standing upon the same ground as those of infants, as is contended in argument, and voidable no further than theirs, the weight of authority appears to be, that the maker of a note cannot, in a suit by an indorsec, avail himself of the defence of infancy in the payee; and that such a defence is only personal to the infant interposing it. Story says, that it seems now to be well settled that the indorsee of a note, by such transfer and indorsement, acquires a good and valid title to the note, against every other party thereto, except the infant, since it is not a void but a voidable title only. Story on Prom. Notes, § 80. Chitty regards the question as to infant indorsers as not fully settled, though his opinion appears to incline to that of Story. Chitty

on Bills, 19, 20. The following cases, among others, hold the same doctrine. Taylor v. Crocker, 4 Esp. 187; Haly v. Lane, 2 Atkins, 182; Nightingale v. Withington, 15 Mass. 272. In the last case, Parker, C. J., says: "An infant may indorse a negotiable promissory note, or a bill of exchange, made payable to him, so as to transfer the property to the indorsee for a valuable consideration. If an action should be brought against the infant as indorser, for default of payment by the promisor, without doubt he may avoid such action by the plea of infancy. But that is a personal privilege, which none but himself can set up in avoidance of any contract made in his favor."

But while we think that, to hold all contracts whatsoever of an insane person to be absolutely void, is carrying the doctrine too far, we also think that there should be a distinction made between the contracts of a minor and those of an insane person. The contracts of minors are held voidable for the reason that they are supposed to lack that discretion, prudence, and experience, which age gives; and for the further reason that their parents being legally bound to support them are also entitled to their time and service. But with a person who is really insane, there is not the capacity to compare, reflect, decide, judge; there is wanting the power to understand the consequences of the acts done, and in many instances to know what is done. minor who indorses a note payable to himself, and receives the money therefor from the indorsee, understands fully what he is doing; and although the act may be indiscreet and one which his natural guardian will disapprove, and although by such indorsement he may not unavoidably bind himself, yet if the payer finds the note in the hands of the indorsee, properly indorsed, he may well suppose that it has been done by the assent of the father, and payment made without notice from the payee Having contracted with the minor to pay the will protect him. amount of the note to him or his order, he cannot deny the contract which he has made, and must be held to pay according to its terms, either to the minor or his order. The minor alone can take advantage of his minority. Moreover the indorsee may be entirely ignorant of the minority, and an innocent holder of the note. The maker, also, may not know of the minority.

But with an insane person the matter is very different. He understands not the effect of indorsing the note, nor whether he

is receiving a valuable consideration for the same or not. He may not even know that he is parting with his property, and an indorsee who should take a note under such circumstances would be guilty of fraud.

If, at the time the note is given, the payee should be insane, and the maker should be aware of the fact, he would be bound in equity and good conscience not to pay it to an indorsee, till he had ascertained that he was the rightful and legal holder. Or if when it is given he should not be aware of the existence of the insanity, or if after it should be given the payee should become insane, the reason is equally strong why he should not pay it without due inquiry, if he had notice of the insanity. And if, under such circumstances, he ought not to be protected in paying the note to the indorsee, then it would seem to follow, as a legitimate consequence, that he should be permitted to show the existence of insanity at the time of the indorsement, in defence of an action brought by the indorsee.

There might, perhaps, be an answer to such a defence; as by showing that the transfer was made by the authority of a guardian, if there should be one. But the fact that there can be a good replication made to a plea involving such a defence, does not show the plea, in itself considered, to be bad. And it appears to us that the due protection of the rights of an insane person requires that this defence should be permitted; for, unless it is, then payment to an indersee must be good, and a judgment in his favor upon the note must be a valid bar to any suit upon the same by the insane person or his representatives.

If the maker of a note pays it to one who is not the rightful holder, it will be no defence to an action by him who is. Davis v. Lane, 8 N. H. 224. But, if he is precluded by law from setting up a special defence against the holder, the existence of that defence cannot be shown in a suit against him by another party, as a reason why he should be chargeable. So if the maker cannot show insanity in the indorser at the time of the transfer, in defence of a suit by the indorsee, then insanity cannot be shown by the indorser or his representatives as a reason why the note should be paid to him instead of the indorsee, and the act of indorsement would be made legal, and the non compose would be unprotected from the effects of his indorsement.

There is another view that may be taken of this question.

An indorsee of a promissory note, to sustain his action against the maker, must show the making of the note, and a due indorsement and transfer; but, if the indorser is insane and incapable of making a legal transfer, then the plaintiff must fail to make his proof. He must fail to sustain the allegations of his declaration. He cannot show an indorsement, which is a requisite essential to his recovery.

This precise point has been so settled in Massachusetts. Peaslee v. Robbins, 3 Met. 164. In delivering the opinion in that case, Wilde, J., says: "The plaintiff is bound to show a legal transfer of the note, by proof of the handwriting of the indorser; and it follows, as a necessary consequence, that the defendant must be allowed to impeach the plaintiff's title to the note, by showing that the indorsement was void. Evidence, therefore, of the indorser's mental incapacity to make a valid contract, at the time he indorsed the note, was material evidence. All the evidence of the indorser's incapacity, before and after the indorsement, was properly submitted to the jury, to enable them to decide correctly on the question of his incapacity at the time of the indorsement."

We are aware that, in holding evidence of the payee's insanity at the time of the indorsement and transfer to be competent as showing a defence for the maker, we interfere to some extent with the principles governing the free circulation of negotiable paper. But we think that greater wrong would be done to the unfortunate insane by excluding the defence, and thereby holding payment to any one who might be possessed of the note to be good, than mischief to community from any infringement upon the general doctrine governing the transfer of negotiable paper by receiving it.

The counsel for the plaintiff has taken the position that this defence cannot be shown under the general issue. But that exception was not taken in the Court below, and cannot therefore be insisted upon here. It would seem, also, that the position itself is unsound, and that insanity may be pleaded specially, or given in evidence under the general issue. Mitchell v. Kingman, 5 Pick. 431; Gould's Pleading, c. 6, § 38.

We discover no error in the ruling of the Court admitting the evidence of the state of accounts and money transactions between the plaintiff's testate and the indorser. The objection

was not to the kind of evidence introduced to show the state of their dealings, but to the admissibility of the dealings themselves. And as it was in its nature rebutting, and in answer to a new position of the defendant, it was competent.

But the ruling excluding the evidence of insanity was wrong, and for its rejection the verdict must be set aside, and a

New trial granted.

INHABITANTS OF MIDDLEBOROUGH v. INHABITANTS OF ROCHESTER.

(12 Mass. 863. Supreme Judicial Court of Massachusetts, 1815.)

Marriage of one non compos mentis.

Assumpsit for the expenses incurred by the plaintiffs in supporting one Susannah Winslow and her child, the lawful settlement of the said paupers being, as the plaintiffs alleged, in the town of Rochester.

A verdict was taken, at the sittings here after the last October term, for the defendants, subject to the opinion of the Court upon a case stated by the parties, in which it was agreed that the charges by the plaintiffs were reasonable, and that due notice had been given by the overseers of Middleborough to the overseers of Rochester, to which a seasonable answer was returned; and that the said Susannah was born in Middleborough, and still had her legal settlement therein, unless her marriage with Ebenezer Winslow was valid in law, so as to change her settlement to Rochester, the place of the lawful settlement of the said Ebenezer, at the time of the said marriage and afterwards.

On the 2d of November, 1806, the said Susannah, then Susannah Thomas, was married to the said Ebenezer Winslow, by a settled minister in Middleborough, at the house of her father, the intention of marriage having been previously published according to law. But long before that time, namely, in July, 1793, the said Ebenezer had been declared to be non compos mentis by a decree of the judge of probate for the county of Plymouth, an inquisition having been first returned by the selectmen of Rochester, to the said judge, upon which he made

his said decree, and issued letters of guardianship over the said Ebenezer and his estate, pursuant to law; and the said letters of guardianship had continued unrevoked until the time of the trial.

The said decree and proceedings were considered at the trial as prima facie evidence only, and both parties were permitted to give evidence touching the state of mind of the said Ebenezer at and about the time of said marriage; he not being a lunatic, but considered non compos for defect of understanding.

The jury were instructed that, if upon all the evidence, including the decree and papers accompanying it, they were satisfied that he had sufficient understanding to be able to make a valid contract respecting property, or to deal with discretion in the common affairs of life, they should consider the marriage valid, and in that case return a verdict for the plaintiffs. But, if they were satisfied that he was not capable of so contracting, for want of intellect, they should find for the defendants.

It was agreed by the parties, that, if, under these circumstances, the said Susannah gained a settlement in Rochester by the said marriage, the verdict should be set aside, and judgment be rendered for the plaintiffs for the sum by them demanded, with interest, from the commencement of the suit and costs; otherwise, judgment should be rendered on the verdict that the defendants recover their costs.

Wood, for the plaintiffs.

Holmes, for the defendants.

Parker, C. J., delivered the opinion of the Court. The verdict having established the fact, that Ebenezer Winslow, to whom the pauper was formerly married, was at the time of the solemnization void of understanding, so as to be incapable of making a valid contract, judgment must be entered for the defendants, unless a marriage, solemnized under such circumstances, will change the settlement of a female pauper from the place of her nativity to the place of her supposed husband's settlement. No authority has been cited to show that such a marriage is valid to any intent or purpose whatever. On the contrary, it is laid down by Blackstone, that, like all other contracts, if made with a fool, or person non compos at the time of it, it is absolutely void. And it is but reasonable that these

¹ 1 Black. Com. 438.

² See Rev. Stat. c. 75, § 5.

unhappy persons, who are prohibited by law from making any binding contract for the merest pecuniary trifle, should be protected from the effects of a covenant of so high a nature, which never could be entered into by the other party without some base or sinister design. If it would be hard that the issue of such marriages should be deemed bastards, it would be as much so, that human beings, without reason, or their families, should be the victims of the artifice of desperate persons who might be willing to speculate on their misfortunes.¹

Judgment according to the verdict.

WIGHTMAN v. WIGHTMAN.

(4 Johns. Ch. 843. Court of Chancery of New York, 1820.)

Marriage of Idiot or Lunatic. — Decree of Nullity.

THE bill, which was sworn to, stated that the plaintiff was married to the defendant on the 5th of July, 1814. That, at the time she was married, she was, as she is now informed and believes, in a state of insanity and mental derangement; and that she should never have consented to the marriage, if she had been in possession of her reason. That she continued insane, as she has been informed and believes, and so she charged the fact to be, for six months. That she has never lived, or in any manner cohabited, with the defendant, as his wife, and can never consent to ratify the marriage. That she has since remained sole on account of the said supposed marriage; and she cannot, in conscience, contract marriage with any man, until that marriage is legally declared void. The plaintiff prayed that the marriage between her and the defendant might be declared null and void.

The answer of the defendant, which was sworn to, admitted the marriage, and that the plaintiff was at the time in an actual state of insanity and mental derangement, as the defendant dis-

¹ Poynter, 147; Browning v. Reame, 2 Phil. 69; Turner v. Meyers, 1 Haggard, 414.

covered immediately after the marriage. That the plaintiff refused to live or cohabit with the defendant, and has ever since refused to do so; and he consented that the marriage should be declared null and void, on account of such insanity of the plaintiff.

S. Ford, for the plaintiff, and the defendant in proper person, after signing his acknowledgment before a Master, for that purpose, submitted the case to the Court, on the bill and answer. The case was ordered to be referred to a Master to examine into the truth of the allegations in the bill, and to report the testimony taken by him, with his opinion thereon. In pursuance of the order of reference, one of the Masters of this Court reported the proof taken before him; and that the defendant had notice of the time and place of the examination, and was present during part of the time. That from the testimony of several witnesses, among whom were the mother and step-father of the plaintiff, the Master was of opinion that all the material allegations in the bill were fully proved and established. The cause was submitted for a final hearing, on the report of the Master, without argument.

THE CHANCELLOR. The fact of insanity of the plaintiff at the time of the marriage, as charged in the bill, and the fact that the parties have never since lived together, or in any manner cohabited with each other, are proved to my satisfaction. It follows, as a necessary consequence from these facts, that the marriage was null and void from the beginning, by reason of the want of capacity in the plaintiff to contract, and has never since obtained any validity, because the plaintiff has never since the return of her lucid interval ratified or consummated it.

It is too plain a proposition to be questioned, that idiots and lunatics are incapable of entering into the matrimonial contract. In Morrison's case before the Delegates (cited in 1 Bl. Com. 439, and 1 Collinson on Lun. 554), it was held that the marriage of a lunatic, not being in a lucid interval, was absolutely void. I cite this case, not so much for the rule which it declares, as to show that, though such marriages be ipso facto void, yet that it is proper that there should be a judicial decision to that effect, by some Court of competent jurisdiction; and that, in England, the Spiritual Court is the appropriate tribunal. I should presume that this was all that could have been intended by the

common-law judges in Stiles v. West (cited in Sid. 112), where it was said, that, if an idiot contract marriage, it was good. In Ash's case (Prec. in Ch. 203; 1 Eq. Cas. Abr. 278, pl. 6), the marriage of a lunatic was controverted in the Spiritual Court, and the Lord Keeper declared, in that case, that if a party contracted marriage when a lunatic, and agreed to it and consummated it in a lucid interval, it would be good. In Smart v. Taylor (9 Mod. 98), before Lord Ch. Macclesfield, it was taken for granted, and assumed as a settled proposition, that marriage by an idiot (and of course by a lunatic) was to be impeached in Doctor's Commons. And in the late case, Ex parte Turing (1 Ves. & Beam. 140), it seemed to have been thought necessary, notwithstanding the Act of 15 Geo. II. c. 30, declaring every marriage of a lunatic void, that there should be a sentence of the Ecclesiastical Court to that effect. This statute could not have been introductory of a new rule, for every marriage of a lunatic must have been void at common law, and by the law of reason; "Furor contrahi matrimonium non sinit, quia consensu opus est." Dig. 23, 2, 16, 2. And Blackstone (1 Com. 439) considers it rather in the light of a declaratory law, and made on account of the difficulty of proving the exact state of the party's mind at the marriage, and also on account of some private family reasons.

The fitness and propriety of a judicial decision, pronouncing the nullity of such a marriage, is very apparent, and is equally conducive to good order and decorum, and to the peace and conscience of the party. The only question, then, is, To what Court does the jurisdiction of such a case belong? There must be a tribunal existing with us, competent to investigate such a charge and to afford the requisite relief; and the power, I apprehend, must reside in this Court, which has not only an exclusive jurisdiction over cases of lunacy, but over matrimonial causes. chancery powers, in case of lunacy, have never been applied to this case, because there existed in England another and peculiar jurisdiction for the case; but, as such a jurisdiction does not exist here, the case seems to belong incidentally to the more general jurisdiction of this Court over those subjects. ever civil authority existed in the Ecclesiastical Courts, touching this point, exists in this Court, or it exists nowhere, and all direct judicial power over the case is extinguished; but that is

hardly to be presumed. For the more full examination of this very interesting point of jurisdiction, let us suppose the abominable case of a marriage between parent and child, or other persons in the lineal or ascending and descending line,—is there no Court that can listen to the voice of nature and reason, and sustain a suit instituted purposely to declare such a marriage void? If a man marry his mother, or his sister, they are husband and wife, say the old cases, until a divorce, and the marriage be judicially dissolved. 39 Edw. III. 31 b; 9 Hen. VI. 34; 18 Hen. VI. 32; Bro. tit. Bastardy, pl. 23; 1 Roll. Abr. 340, A. 1, 4; 857, A. 3. Are the principles of natural law and of Christian duty to be left unheeded and inoperative, because we have no Ecclesiastical Courts recognized by law, as specially charged with the cognizance of such matters? All matrimonial and other causes of ecclesiastical cognizance belonged originally to the temporal Courts (vide case of Legitimation and Bastardy, Sir J. Davies's Rep. 140, and his argument in the case of Præmunire, id. 278); and when the spiritual Courts cease, the cognizance of such causes would seem, as of course, to revert back to the lay tribunals. I apprehend, then, that the power is necessarily cast upon this Court, which has, by statute, the sole jurisdiction over the marriage contract in certain specified cases. The legislature has, in that respect pointed to this Court as the proper organ of such a jurisdiction.

We are placed in a singular situation in this State, and probably one unexampled in the Christian world; since we have no statute regulating marriage, or prescribing the solemnities of it, or defining the forbidden degrees. It remains to be settled, not only where the jurisdiction in some of these cases resides, but what are the sound and binding principles of common law under which that jurisdiction is to be exercised.

It was said by Vaughan, C. J., in Harrison v. Buswell (Vaug. 206, 2 Vent. 9, s. c.), in delivering the opinion, which he declared to be given upon consultation with all the judges of England, that, by the ancient common law, some marriages were within forbidden degrees and unlawful, and that the cognizance of such questions belonged to the spiritual Courts. But he observed that, if it were not for the Statutes of Hen. VIII. (and which we have not re-enacted), it would be difficult to prove that they were civilly bound by the Levitical degrees, in respect to

the lawfulness of marriage connections, unless the prohibition was also clearly dictated by the natural law. He held that marriage in the ascending and descending line, as between parents and children, were monstrous connections, and repugnant to the law of nature; and that so far, the Levitical was a moral, as contradistinguished from a positive, prohibition to the Jews, and binding upon all mankind.

Divorces a vinculo, says Lord Coke (1 Inst. 235 a), are causa metus, causa impotentiæ, causa affinitatis, causa consanguinitatis, &c. (Vide also the case of the Earl of Essex, divorced in the Court of Delegates, and Bury's case, 1 St. Tr. 315, 10 St. Tr. App. 23, Harg. edit.) These cases, and that of lunacy, are not within the statute giving to this Court jurisdiction concerning divorces; for the statute in respect to divorces a vinculo matrimonii only applies to adultery. All the causes for divorce specified in our statute are those which arise subsequent to the marriage, and suppose it to have been lawful in the beginning. But I presume every one will readily admit, that there are other causes which render the marriage unlawful ab initio; such as lunacy, idiocy, duress, consanguinity, &c.; and the question is, whether we have not a Court which is competent, not merely collaterally, but by a suit instituted directly, and for the sole purpose, to pronounce a divorce in such cases. ples of canonical jurisprudence, and the rules of the common law, are the same in respect to some of those strong instances which I have mentioned, and there must be a tribunal to apply them. If it were otherwise, there would be a most deplorable and distressing imperfection in the administration of justice.

Besides the case of lunacy now before me, I have, hypothetically, mentioned the case of a marriage between persons in the direct lineal line of consanguinity, as clearly unlawful by the law of the land, independent of any church canon, or of any statute prohibition. That such a marriage is criminal and void by the law of nature, is a point universally conceded. And, by the law of nature I understand those fit and just rules of conduct which the Creator has prescribed to man, as a dependent and social being; and which are to be ascertained from the deductions of right reason, though they may be more precisely known, and more explicitly declared, by divine revelation. There is one other case in which the marriage would be equally

void causa consanguinitatis, and that is the case of brother and sister; and, since it naturally arises in the consideration of this subject, I will venture to add a few incidental observations. am aware, that, when we leave the lineal line, and come to the relation by blood or affinity in the collateral line, it is not so easy to ascertain the exact point at which the natural law has ceased to discountenance the union. Though there may be some difference in the theories of different writers on the law of nature, in regard to this subject, yet the general current of authority, and the practice of civilized nations, and, certainly, of the whole Christian world, have condemned the connection in the second case which has been supposed, as grossly indecent, immoral, and incestuous, and inimical to the purity and happiness of families, and as forbidden by the law of nature. Grotius de Jure, &c. lib. 2, c. 5, § 13; Puffend. de Jure Gent. lib. 6, c. 1, § 84; Id. de. Off. Hom. lib. 2, c. 2, § 8; Heinec. Op. tom. 8, pars 2, p. 203; Taylor's Elem. Civ. Law, 326; Montesq. Esp. des Loix, liv. 26, c. 14; Paley's Moral Philosophy, b. 3, part 3, c. 5. We accordingly find such connections expressly prohibited in different codes. Dig. lib. 23, tit. 2, 18; lib. 23, tit. 2, 1, 14, § 2; lib. 45, tit. 1, l. 35, § 1; Just. Inst. lib. 1, tit. 10; De Nuptiis, Vinnius, h. t.; Heinec. ubi supra; Code Civile de France, n. 161-164; Inst. of Menu, by Sir William Jones, c. 3, § 5; Staunton's Ta-Tsing-Leu-Lee, §§ 107, 108; Sale's Koran, c. 4; Marsden's Sumatra, p. 194, 221. And whatever may have been the practice of some ancient nations, originating, as Montesquieu observes, in the madness of superstition, the objection to such marriages is undoubtedly founded in reason and It grows out of the institution of families, and the rights and duties, habits and affections, flowing from that relation, and which may justly be considered as part of the law of our nature as rational and social beings. Marriages among such near relations would not only lead to domestic licentiousness, but, by blending in one object duties and feelings incompatible with each other, would perplex and confound the duties, habits, and affections proceding from the family state, impair the perception and corrupt the purity of moral taste, and do violence to the moral sentiments of mankind. Indeed, we might infer the sense of mankind, and the dictates of reason and nature, from the language of horror and detestation, in which such incestuous connections have been reprobated and condemned in all ages. Plato de Leg. lib. 8; Cic. Orat. pro. Mil. 27; Hermion. in Eurip. Androm. v. 175; Byblis. Ovid. Met. lib. 9; Tacit. Ann. lib. 12, c. 4; Vell. Paterc. Hist. lib. 2, c. 45; Corn. Nep. Excel. Imp. Prefat.

The general usage of mankind is sufficient to settle the question, if it were possible to have any doubt on the subject; and it must have proceeded from some strong, uniform, and natural principle. Prohibitions of the natural law are of absolute, uniform, and universal obligation. They become rules of the common law, which is founded in the common reason and acknowledged duty of mankind, sanctioned by immemorial usage, and, as such, are clearly binding. To this extent, then, I apprehend it to be within the power and within the duty of this Court, to enforce the prohibition. Such marriages should be declared void, as contra bonos mores. But, as to the other collateral degrees beyond brother and sister, I should incline to the intimation of the judges in Harrison v. Buswell, already cited, that, as we have no statute on the subject, and no train of common-law decisions, independent of any statute authority, the Levitical degrees are not binding as a rule of municipal obedi-Marriages out of the lineal line, and in the collateral ence. line beyond the degree of brothers and sisters, could not well be declared void, as against the first principles of society. laws or usages of all the nations to whom I have referred do. indeed, extend the prohibition to remoter degrees; but this is stepping out of the family circle, and I cannot put the prohibition on any other ground than positive institution. There is a great diversity of usage on this subject. "Neque teneo, neque dicta refello." The limitation must be left, until the legislature thinks proper to make some provision in the case, to the injunctions of religion, and to the control of manners and opinion.

I have been led further than I at first intended, by these remarks, which have been made merely by way of argument and in illustration of the question touching the power and duty of the Court to declare void the marriage of the lunatic in the case before me. I trust I have shown that there must exist such a power for this and other cases; and I also trust, that this Court will never be under the painful necessity of making a more solemn and direct application of the doctrine.

I shall, accordingly, declare the marriage null and void, and that the parties are free from the obligations of marriage with each other.

Decree accordingly.

SEAVER v. PHELPS.

(11 Pick. 304. Supreme Judicial Court of Massachusetts, 1831.)

Executed Contracts of Insane Persons; when Rescindable.

TROVER, to recover the value of a promissory note, pledged by the plaintiff to the defendant. The suit was brought on the ground that the plaintiff was in a state of insanity at the time when he made the pledge. At the trial in the Common Pleas, before Williams, J., the counsel for the defendant requested the judge to instruct the jury, that although they should believe the plaintiff was insane and incapable of understanding at the time of making the contract, yet that if the defendant was not apprised of that fact, or had no reason, from the conduct of the plaintiff or from any other source, to suspect it, and did not overreach or impose upon the plaintiff, or practise any fraud or unfairness, then the contract was not to be annulled. But the judge held this not to be law, and instructed the jury otherwise; and the jury returned a verdict for the plaintiff. To this opinion the defendant excepted.

Willard, in support of the exceptions, cited Beverley's case, 4 Co. 124; Niell v. Morley, 9 Ves. 478; Chitty on Contr. 255, cites Bagster v. Earl of Portsmouth, 7 Dowl. & Ryl. 614.

G. Bliss and G. Ashmun, for the plaintiff, cited Chitty on Contr. 29, 30; Mitchell v. Kingman, 5 Pick. 431; Webster v. Woodford, 3 Day, 90; Lang v. Whidden, 2 N. H. 435; Grant v. Thompson, 4 Conn. 203; Rice v. Peet, 15 Johns. 503.

WILDE, J., delivered the opinion of the Court. The general doctrine that the contracts, and other acts in pais, of idiots and insane persons, are not binding in law or equity, is not denied. Being bereft of reason and understanding, they are considered incapable of consenting to a contract, or of doing any other valid act. And although their contracts are not generally absolutely

void, but only voidable, the law takes care effectually and fully to protect their interests; and will allow them to plead their disability in avoidance of their conveyances, purchases, and contracts, as was settled in Mitchell et al. v. Kingman, 5 Pick. 431. And such is probably the law in England at the present day, although the doctrine for a long time prevailed there, that no one should be allowed to plead his own incapacity and to stultify These principles are not controverted by the defendant's counsel; but they maintain, that if the plaintiff was of unsound mind and incapable of understanding, at the time he pledged the note to the defendant, yet if the defendant was not apprised of that fact, or had no reason to suspect it from the plaintiff's conduct, or from any other source, and did not overreach him, or practise any fraud or unfairness, then that the contract of bailment was valid and binding, and could not be avoided in the present action. And they requested the Court of Common Pleas so to instruct the jury. That Court, however, were of opinion that the law was otherwise, and we all concur in the same opinion. If it had been only proved that the plaintiff was a person of weak understanding, the instructions requested would have been appropriate and proper. For every man, after arriving at full age, whether wise or unwise, if he be compos mentis, has the capacity and power of contracting and disposing of his property, and his contracts and conveyances will be valid and binding, provided no undue advantage be taken of his imbecility.

It is sometimes difficult to determine what constitutes insanity, and to distinguish between that and great weakness of understanding. The boundary between them may be very narrow, and in fact often is, although the legal consequences and provisions attached to the one and the other respectively are widely different.

In the present case, however, this point is settled by the verdict, and no question is made respecting it. We are to consider the plaintiff as in a state of insanity at the time he pledged his note to the defendant; and, this being admitted, we think it cannot avail him, as a legal defence, to show that he was ignorant of the fact, and practised no imposition. The fairness of the defendant's conduct cannot supply the plaintiff's want of capacity. The defendant's counsel rely principally on a dis-

tinction between contracts executed, and those which are executory. But if this distinction were material, we do not perceive how it is made to appear that the contract of bailment is an executed contract; for if the note was pledged to secure the performance of an executory contract, and was part of the same transaction, it would rather be considered an executory contract. But we do not consider the distinction at all material. It is well settled that the conveyances of a non compos are voidable, and may be avoided by the writ dum fuit non compos mentis, or by entry.

The case of Bagster et al. v. The Earl of Portsmouth, 5 Barn. & Cress. 172, but more fully reported in 7 Dowl. & Ryl. 614, has been relied on as countenancing the distinction contended for, and to show its bearing on the point in question; and it is true that some of the remarks which fell from the Court in giving their opinion may be thought to have some bearing in this respect. But the point decided, and the grounds of the decision, not only fail to support the defence in this action, but may be considered as an authority in favor of the plaintiff. This was an action of assumpsit for the use of certain carriages hired by the defendant, he being at the time of unsound mind, and judgment was rendered for the plaintiff, on the ground that no imposition had been practised on his part; and particularly because the carriages furnished appeared to be suitable to the condition and degree of the defendant, considering the contracts of a non compos on the same footing as those of an infant; and the Court say in Thompson v. Leach, 3 Mod. 310, "that the grants of infants, and of persons non compos, are parallel both in law and reason." Now no one would, we apprehend, undertake to maintain that the plaintiff would have been bound, if he had been a minor when he pledged the note. It does not appear to have been pledged for necessaries; and all contracts of infants are either void or voidable, unless made for education or necessaries suitable to their degree and condition. And even if the note had been pledged as security for the payment of necessaries, it would not have been binding if the plaintiff had been an infant. For a pledge is in the nature of a penalty, and may be forfeited, and can be of no advantage to the infant, and therefore shall not bind him.

If, then, idiots and insane persons are liable on their contracts

for necessaries, they are certainly entitled to as much protection as infants. It matters not, however, how this may be, since the contract in question is not one for necessaries. In the case of Browne v. Joddrell, 1 Moody & Malkin, 105, Lord Tenterden expressed an opinion, that in assumpsit for goods sold and delivered, and for work and labor, it would be no defence that the defendant was of unsound mind, unless the plaintiff knew of, or in any way took advantage of, his incapacity, to impose on him. This, however, was an opinion expressed at nisi prius, and whether the opinion was followed up to the final decision of the cause or not, does not appear. But, however this may be, the opinion is founded on the old rule, somewhat qualified, that no one can be allowed to plead his own disability or incapacity, in avoidance of his contracts. This rule having been wholly exploded in this commonwealth, Lord Tenterden's opinion can have no weight here, unless some good reason could be shown for overruling the case of Mitchell et al. v. Kingman, which we think cannot be done.

We are aware that insanity is sometimes hard to detect, and that persons dealing with the insane may be subjected to loss and difficulty, but so they may be by dealing with minors. The danger, however, cannot be great, and seems to furnish no sufficient cause for modifying the rules of law in relation to insane people, if we had any power and authority so to do; which we have not.

Judgment of C. C. P. affirmed.

MOLTON v. CAMROUX.

(2 Exch. 487; s. c. affirmed in 4 Exch. 17. Court of Exchequer, 1848.)

Executed Contracts of Insane Persons: when Rescindable.

Assumpsite by the plaintiff, as administratrix of Thomas Lee, against the defendant, as secretary of the National Loan Fund Life Assurance Company, for money had and received to the use of Thomas Lee, and of the plaintiff as his administratrix, and on an account stated.

Plea, — non assumpsit.

At the trial of the cause, before Pollock, C. B., at the London sittings after Michaelmas Term, 1846, the jury found certain facts, and the plaintiffs had a verdict, leave being reserved to enter a nonsuit.

Gurney, in Hilary Term, 1847, obtained a rule nisi, in pursuance of leave reserved, with leave to turn the facts into a special verdict. A special verdict was agreed upon, which embodied the following facts:—

The present action was brought to recover from the defendant, the secretary of the National Loan Fund Life Assurance Society, two sums of 350l., and 5l. 6s. 2d., which had been paid by Thomas Lee, the deceased, to the society, under the following circumstances.

Thomas Lee, on the 29th of August, 1843, made a proposal to the said society for the purchase of an annuity of 211. 12s. 10d. for his life, payable yearly on the 29th of August, the first payment to be made on the 29th of August in the following year, and that he should pay the sum of 350l., as the consideration of that annuity; and on the same day he made a proposal to the said society for the purchase of a deferred annuity of 30l. for his life, to commence on his attaining the age of sixty years, which would be on the 30th of June, 1864, the first payment to be on the 30th of June, 1865, reserving to him the option of receiving, in lieu of such annuity, the sum of 293l. 5s. payable immediately, or the deferred sum of 3771. 5s., to be paid to his representatives after his death. The proposals were assented to and accepted by the society, and the terms of the agreements were embodied in two policies of insurance, bearing date respectively the 29th of August, 1843. The sums agreed upon of 350l. and 51. 6s. 2d., were then paid by the deceased, who subsequently No memorial of these annuities had died intestate in 1844. ever been enrolled in the High Court of Chancery. At the time of the making of these proposals, and of the assenting thereto and acceptance thereof, and of the granting of the said annuities, and of the payment of the said sums by Thomas Lee, the intestate, he was a lunatic, and of unsound mind, so as to be incompetent to manage his affairs; but of this the society had not at that time any knowledge. The purchases of the annuities by Thomas Lee were transactions in the ordinary course of the affairs of

human life, and the granting of the annuities to him in the manner and upon the terms before mentioned, were fair transactions, and transactions of good faith on the part of the society, and in the ordinary course of their business; and at the time of making the proposals, and at the time they were assented to and accepted by the society, and of the granting of the annuities and of the payment of the two sums by him, he appeared to the society to be of sound, though he was then in fact of such unsound mind, as aforesaid. The society first had notice of the unsoundness of mind of the grantee by letter dated the 23d of September, 1843, from his solicitors. No commission of lunacy had ever been issued against the grantee. The society had never made any payments in respect of the annuities in question, but had always been ready and willing to pay any sum which might have become due under them, and had never attempted to avoid the agreements.

The plaintiff's points were, that the said Thomas Lee, being of unsound mind, could not make a valid contract of the nature set forth in the verdict; and, secondly, that the supposed contracts were void by statute, for want of enrollment. And therefore that the plaintiffs were entitled to recover back the sums of money so paid.

The case was argued in Hilary Term, on the 17th and 21st of January, by

Needham, for the plaintiffs. The present case raises two questions for the opinion of this Court. First, whether the personal representatives of a lunatic can recover money which he has paid under a contract with a person who has entered into it bond fide, and without knowledge of the lunacy. whether the annuity granted is void for want of enrollment Upon the first point there is no direct authority; but there are many authorities in support of the principle that a lunatic cannot make a contract to bind his property. Thus the old writ of dum fuit non compos mentis lay to recover back land which had been aliened by a person not in his right mind, Fitz. Nat. Brev. 202 (C); and it has been held, that a person non compos mentis cannot either make or revoke a will, 6 Rep. 23, and the Courts have already held their wills to be void. Nor can a lunatic suffer a recovery, Hume v. Burton, 1 Ridg. Parl. Cas. 16; Keene v. Keene, ibid. 91; nor execute a deed, Yates v. Boen, 2 Stra.

1104; nor a bond, Faulder v. Silk, 3 Camp. 126; so he cannot indorse a bill of exchange, Alcock v. Alcock, 3 M. & Gr. 268;¹ nor state an account, Tarbuck v. Bispham, 2 M. & W. 2. rule is the same as respects parol contracts. In Palmer v. Parkhurst, 1 Ch. Cas. 112, a bargain by a lunatic, eight years before the lunacy found, was avoided by the party being found a lunatic. - [PARKE, B. Was it suggested in that case, that it was known by the defendant, at the time of the bargain, that the party was a lunatic?] It does not appear by the report whether or not he was acquainted with the lunacy. [PARKE, B. We are not able to tell what the form of the plea was in Alcock v. Alcock; it does not appear whether there was any allegation of notice or knowledge of the lunacy. The principle for which the plaintiff now contends is, that a lunatic cannot enter into a binding contract, as he cannot have a consenting mind. [Platt, B. In Dane v. Viscountess Kirkwall, 8 C. & P. 685,2 it was held by Patteson, J., at nisi prius, that it was not sufficient to show that Lady Kirkwall was of unsound mind, but that the jury must be satisfied that the plaintiff knew it and took advantage of it. That ruling was subsequently upheld by the Court of Queen's Bench, in the same case.] In Clerk v. Clerk, 2 Vern. 212, it was held, that a family settlement made by a lunatic ought to be set aside, although it was reasonable and for the convenience of the family. So the marriage of a lunatic is void. Turner v. Myers, 1 Hagg. C. 414. There Sir W. Scott says "It is, I conceive, perfectly clear in law, that a party may come forward to maintain his own past incapacity; and also that a defect of incapacity invalidates the contract of marriage as well as any other contract." In Howard v. Lord Digby, 2 Cl. & Fin. 661, Brougham, L. C., "The law on this point is as clear, both in equity and in lunacy, and at common law, as that a man's eldest legitimate son is his heir to freehold land. A lunatic cannot bind himself by bond or by bill; a lunatic cannot release a debt by specialty; cannot be a cognizor in a statute merchant, staple, a judgment, warrant of attorney, or any other security." [Pollock, C. B. Surely a payment by a lunatic would be a good answer to the debt for which the lunatic was liable before his lunacy.] The defence of intoxication stands upon the same principle as that

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¹ E. C. L. R., vol. 42.

² E. C. L. R., vol. 34.

of lunacy; and in the recent case of Gore v. Gibson, 13 M. & W. 623, this Court held, that acts done by a man who had lost his senses at the time are totally void. [PARKE, B. The ancient doctrine, that no man of full age shall be permitted to stultify himself, has been much qualified and restricted in modern times. There is a learned note on this subject, at the end of the report of Gore v. Gibson, in the Jurist, vol. 9, p. 142. ALDERSON, B. There is this distinction between the case of lunacy and that of intoxication,— in the latter the incapacity of the party is patent; in the former, it may not be in the least degree visible.] In one respect, the two cases are analogous, in neither of them has the sufferer a consenting mind. lunatic is not criminally liable. Reg. v. Oxford, 9 C. & P. 525.1 [PARKE, B. It has been held that a lunatic innkeeper is liable for the loss of his guest's goods. Cross v. Andrews, Cro. Eliz. 622.] There are three exceptions to be found to the rule contended for in the case of lunacy; but these exceptions will, perhaps, be found to strengthen the rule. A fine levied by a person non compos mentis has been held good, Thompson v. Leach, 3 Mod. 305; Needles v. The Bishop of Winchester, Hob. 220; and the reason, as it appears from Beverley's case, 4 Rep. 124, is, that the act is of a public and notorious character, done in a Court of record, and that the Court had the power of judging of the sanity of the party. This is confirmed by Stat. 18 Ed. I. § 4, the Modus levandi fines, and 10 Ed. II. De finibus, and by Mansfield's case, 12 Rep. 124, where a fine had been made by one Bushley, an idiot, "but notwithstanding this, and although the monstrous deformity and idiocy of Bushley was apparent and visible, yet the fine stood good." The second exception to the general rule is that of a feoffment by a lunatic. Thompson v. Leach, Carth. 435. The Court there said: "There is a difference between a feoffment and a livery made propriis manibus of an idiot, and the bare execution of a deed by sealing and delivery thereof, as in cases of surrenders, grants, releases, &c., which have their strength only by executing them, and in which the formality of livery and seisin is not so much regarded in law, and therefore the feoffment is not merely void, but voidable; but surrenders, grants, &c., by an idiot, are void ab initio." The third exception is that of necessaries; but these

are clearly excepted from the general rule, on the ground that they do not require a consenting mind. Thus, an infant or an idiot may be liable for necessaries, as was said in Manby v. Scott, 1 Sid. 112. The contracts, however, of an infant are only voidable, and not void. Baxter v. Lord Portsmouth, 5 B. & C. 170, is a leading case upon this branch of the subject. ABBOTT, C. J., there says "At the time the orders were given and executed, Lord Portsmouth was living with his family, and there was no reason to suppose that the plaintiffs knew of his insanity. I thought the case very distinguishable from an attempt to enforce a contract not executed, or one made under circumstances which might have induced a reasonable person to suppose the defendant of unsound mind. The latter would be cases of imposition; and I desired that my judgment might not be taken to be, that such contracts would bind, although I was not prepared to say that they would not." In Gore v. Gibson, 13 M. & W. 623, the distinction is clearly pointed out; namely, that, to make a party liable for necessaries, it is not necessary that there should be the assent of both parties. Pollock, C. B., there says: "With regard, however, to contracts which it is sought to avoid on the ground of intoxication, there is a distinction between express and implied contracts. Where the right of action is grounded upon a specific distinct contract, requiring the assent of both parties, and one of them is incapable of assenting, in such a case there can be no binding contract; but in many cases the law does not require an actual agreement between the parties, but implies a contract from the circumstances; in fact the law itself makes the contract for the parties. Thus, in actions for money had and received to the plaintiff's use, or money paid by him to the defendant's use, the action may lie against the defendant, even though he may have protested against such a So, a tradesman who supplies a drunken man with necessaries may recover the price of them, if the party keeps them when he becomes sober, although a count for goods bargained and sold would fail. In this case, the defendant is still liable for the consideration for his indorsement, although the indorsement itself can give the plaintiff no title." [PARKE, B. A fourth exception is mentioned in Beverley's case; viz., a recognizance. ALDERSON, B. Suppose the lunatic is benefited,

¹ E. C. L. R., vol. 11.

do you argue that in such a case the contract is void? It is [He also referred to Niell v. submitted that it would be. Morley, 9 Ves. Jur. 478, and Kent's Commentary, 451.] In Turner v. Myers, 1 Hagg. C. 414, Sir W. Scott says: "It is, I conceive, perfectly clear in law, that a party may come forward to maintain his own past incapacity, and also, that a defect of incapacity invalidates the contract of marriage, as well as any other contract. It is true, that there are some obscure dicta in the earlier commentators on the law (Sanchez, lib. 1, disp. 8, num. 15), that a marriage of an insane person could not be invalidated on that account; founded, I presume, on some notion that prevailed, in the dark ages, of the mysterious nature of the contract of marriage, in which its spiritual nature almost entirely obliterated its civil character. In modern times, it has been considered in its proper light, as a civil contract as well as a religious vow, and, like all civil contracts, will be invalidated by want of consent of capable persons." [Pollock, C. B. I recollect a case where a marriage was set aside, although there was no appearance of lunacy at the time of the offer of marriage. Pothier, in his Treatise on Obligations, P. 1, c. 1, § 1, art. 1, says: "A contract is a particular kind of agreement; to understand the nature of a contract, we should, therefore, previously understand the nature of an agreement. An agreement is the consent of two or more persons to form some engagement, or to rescind or modify an engagement already made, 'Duorum vel plurium in idem placitum consensus." Again, in speaking of persons capable or incapable of contracting, he says (id. art. 4): "The essence of a contract consisting in consent, it follows that a person must be capable of giving his consent, and, consequently, must have the use of his reason, in order to be able to contract." In the appendix to that article, the distinction is pointed out between persons incapable by law of contracting, and those incapable by nature.

Secondly, the annuity is void, for want of the enrollment of a memorial, in pursuance of the Stat. 53 Geo. III. c. 141. . . .

Gurney, for the defendant. It is conceded that an unexecuted contract by a lunatic cannot be enforced; but there is no case in which an executed contract, made for valuable consideration, and without notice of fraud, has been held void. In Palmer v. Parkhurst, Ch. Cas. 112, the bill charged that the pretended

satisfaction was not valuable, and was done in prejudice of the lunatic; the answer did not state it to be valuable. In Clerk v. Clerk, 2 Vern. 413, the conveyance was voluntary and without consideration. In Addison v. Dawson, id. 678, fraud was alleged and proved. Howard v. Digby, 2 Cl. & Fin. 634, shows that the law will sometimes imply a contract, notwithstanding lunacy. The earlier cases do not proceed on the ground, now exploded, that a lunatic cannot stultify himself, but that such contracts are not fair and equal between the parties. On that principle, an exchange, if equal, was held good. Perkins, in his Profitable Book, tit. Exchange, pl. 298, says: "And if a man of unsound memory, being seised of land in fee, exchanges the same with a stranger for other land in fee, and the exchange is executed, and he of unsound memory dies, and his heir enters into the land taken in exchange by his father, now he shall not avoid this exchange." So with respect to partition, in Co. Litt. 166 a, it is said: "If coparceners make partition at full age, and unmarried and of sane memorie, of lands in fee simple, it is good and firm forever, albeit the values be unequal; but if it be of lands entailed, or if any of the parceners be of non sane memorie, it shall bind the parties themselves, but not their issue, unless it be equal." Also in Bac. Abr. tit. Idiots and Lunatics (F.), it is said: "The feoffment of an idiot or non compos is not void, but voidable; but it cannot be avoided by himself, by entry, &c.; and the reason hereof, given in some books, is, as before observed, because no man by law is permitted to disable himself. The better reason in this case seems to be, that, anciently, these feoffments were not only made for the benefit of the parties, but of the realm, being annually paid for by the attendance of the tenants, in military service or in tillage, and so were presumed to be equally for the benefit of the lord and tenant; and, therefore, they were not holden to be void in themselves." A lunatic may grant by fine; for, that proceeding having formerly taken place before a judge, he was presumed to guard against any unfair advantage being taken of the Murley v. Sherran, 8 A. & E. 754.1 [PARKE, B. lunatic. it not rather that the judge was supposed to take care that the party was in a fit state of mind?] The form of pleas in avoidance of contracts, on the ground of lunacy or drunkenness, shows

¹ E. C. L. R. vol. 35.

that the inquiry in those cases is as to the transaction being fair; for such pleas invariably contain an averment of notice. Dane v. Viscountess Kirkwall, 8 C. & P. 679, Gore v. Gibson, 13 M. & W. 623. In Sentance v. Pool, 3 C. & P. 1,2 where the defence of imbecility of mind was set up in an action by indorsee against maker of a promissory note, Lord Tenterden told the jury, that, "should they be satisfied that the defendant was not conscious of what he was doing, and that he was imposed upon by reason of his imbecility of mind, they ought to find for him." That learned judge evidently considered, that the mere fact of being imbecile was not sufficient to avoid the contract, without showing that an unfair advantage had been taken. distinction in principle between a contract by a lunatic for necessaries or for any other purpose, except that necessaries are evidence to show the fairness of the contract. It is true that Baxter v. The Earl of Portsmouth, 5 B. & C. 170,8 was a case of necessaries; but the judgment of Lord Tenterden proceeds on the ground, that the only contracts open to dispute are those not executed, or made under circumstances which might have induced a reasonable person to suppose the party was of unsound mind. Williams v. Wentworth, 5 Beav. 325, shows that, in the case of necessaries supplied to a lunatic, the law will imply a promise to pay. In Browne v. Joddrell, 3 C. & P. 30,4 the defendant was charged on a contract, as a member of an institution; and Lord Tenterden ruled that unsoundness of mind was no defence, unless it were shown that the plaintiff imposed on the defendant. Reference is there made to a case of Levy v. Baker, in which the ruling of Best, J., is to the same effect. Dane v. Viscountess Kirkwall, and Clarke v. Metcalf, are also cases in which lunatics were held liable on contracts, though not for necessaries. No case has yet decided, that an executed contract, if fair and bond fide, can be questioned on the ground of the lunacy of one of the parties. It is said that a lunatic is not criminally responsible; but the more correct statement would be, that a person being a lunatic cannot be guilty of that which amounts to murder or high treason. [PARKE, B. In Beverley's case, 4 Rep. 123 a, Lord Coke says, that a lunatic may commit

¹ E. C. L. R., vol. 34.

⁴ Id. 14.

² Id. 14.

⁵ Cited in Smith on Contracts.

^{*} Id. 11.

high treason if he kills or offers to kill the king.] A lunatic is liable civilly for a trespass; he is also liable, as an innkeeper, for the loss of his guest's goods. Cross v. Andrews, Cro. Eliz. 622. Whether or no he can state an account, seems undecided. Tarbuck v. Bispham, 2 M. & W. 2. In Selby v. Jackson, 6 Beav. 192, the Court refused to set aside deeds executed by a lunatic while under restraint in an asylum. The Master of the Rolls, in delivering judgment, says: "In this case it is very remarkable, that there is no allegation of fraud against the defendants, no pretence that coercion was used, or any stratagem, or any contrivance, employed to compel or induce the plaintiff to do an act in any way tending to the personal benefit of the defendants." This case falls within the rule laid down in Niell v. Morley, 9 Ves. Jun. 478; viz., that a Court of equity will not interfere to set aside the contract of a lunatic if fair and without notice, especially where the parties cannot be reinstated. The question is not, whether the payment of the premiums could have been enforced against the lunatic in his lifetime, but whether the purchase-money can now be recovered back. many respects the case of a lunatic is assimilated to that of an infant; and the observations of Lord Mansfield, in Zouch v. Parsons, 1 W. Bl. 575, are applicable to both; viz., that "the privilege is a shield, and not a sword." This is like the attempt to recover premiums paid on an insurance without interest; in which case it has been held that the premiums cannot be recovered after the risk has been run. Lowry v. Bourdieu, 2 Dougl. 468. So also with respect to premiums paid on a policy void under the 19 Geo. III. c. 37; Andree v. Fletcher, 3 T. R. 266; or any illegal assurance, Lubbock v. Potts, 7 East, 449; Morck v. Abel, 3 B. & P. 35.

Needham, in reply. The case of Baxter v. The Earl of Portsmouth did not establish the rule, but the exception. The maxim of the Roman law, "Furiosus nullum negotium gerere potest, quia non intelligit quod agit" (Inst. lib. 3, tit. 20, § 8), has been adopted by all text writers in every civilized community. Upon what principle is it that a lunatic cannot suffer a recovery, and that his bond is void, unless it be that he cannot make a contract? In Thompson v. Leach, 3 Mod. 310, the Court say: "The grants of infants and persons non compos are parallel, both in

law and reason." A lunatic, not having the power of consenting, is incapable of making a contract.

Cur. adv. vult.

The judgment of the Court was now delivered by

Pollock, C. B. This was an action for money had and received, brought to recover from the defendant (as secretary to an assurance and annuity society) two sums paid by the intestate Thomas Lee, in his lifetime, as the price or consideration for two annuities granted by the society, determinable with his life. At the trial, the money was claimed on two grounds: first, that the grantee was not of sound mind at the time the contract was made, and was therefore incapable of contracting, and, there being no contract, or a void contract, the money was recoverable; secondly, that there was no memorial of the annuities enrolled, and therefore they were void, and the money could be recovered back. Both the points were reserved at the trial; and subsequently, on a motion for a new trial, a special verdict was entered by agreement, setting forth the facts of the case, and raising the two points above stated.

The special verdict was argued before us on the 17th and 21st of January last, when the Court expressed a very clear opinion, that the second ground, of want of enrollment of a memorial, could not be supported, on the authority of the case of Davis v. Bryan, 6 B. & C. 651¹ (and of other cases), where the point was expressly decided: but, as to the other ground, the Court took time to consider; and upon deliberation we are all of opinion that, upon the finding of the jury that the "purchasing the said annuities were transactions in the ordinary course of the affairs of human life, and that the granting of the said annuities were fair transactions, and of good faith, on the part of the company, without any knowledge or notice on the part of the company of the unsoundness of mind," the action is not sustainable; and our judgment must be for the defendant.

As to the rule of common law, the older authorities differ. According to the opinion of Littleton, § 405, and Lord Coke, I Inst. 247 b, and Beverley's case, 4 Rep. 123 a (disagreeing with Fitzherbert's Natura Brevium, 202), no man could be allowed to stultify himself, and avoid his acts, on the ground of his being non compos mentis; but certainly the law did not allow the party himself to set aside, by any plea of insanity, acts of a public and

notorious character, such as acts done in a Court of record, and feoffments with livery of seisin, the doing or executing of which would not presumably be allowed, unless a party appeared to be of sound mind.

The purchase also by a lunatic was valid, and vested the estate, and, though his heirs might disagree to it, he could not. Co. Litt. 2.

But the rule, as above laid down by LITTLETON and COKE, has no doubt in modern times been relaxed, and unsoundness of mind (as also intoxication) would now be a good defence to an action upon a contract, if it could be shown that the defendant was not of capacity to contract, and the plaintiff knew it. cases of Dane v. Viscountess Kirkwall, 8 C. & P. 679, and Gore v. Gibson, 13 M. & W. 623, were cited to prove this, and their authority fully supports the doctrine contended for. The plaintiff's counsel distinguished the cases of Browne v. Joddrell, 1 Moor & M. 105,² and Baxter v. The Earl of Portsmouth, 2 C. & P. 178,8 5 B. & C. 170,4 and other cases of that sort, on the ground that necessaries furnished to a lunatic were an exception to the general doctrine that he could not make a contract; and he cited the judgment of the Lord Chief Baron, in the case of Gore v. Gibson, as showing a distinction between express and implied contracts, and deciding that all express contracts were void, if the parties to them were incapable of making a contract. On the other hand, it was argued by the defendant's counsel, that there was a distinction between contracts executed and executory; that executory contracts could not be enforced, but that executed contracts could not be disturbed, if made in good faith and without notice of the incapacity; and he called our attention to this, that all the cases cited were cases where damages for the breach of an executory contract were in question, but that no case had yet decided that an executed contract, if perfectly fair and bond fide, could be questioned on the ground of the unsoundness of mind of one of the parties; and he cited the cases of Howard v. The Earl of Digby, 2 Cl. & Fin. 634; Williams v. Wentworth, 5 Beav. 325, and Selby v. Jackson, 6 Beav. 192, to show that the House of Lords in the first case, and Lord Langdale in the two last, had recognized the liability of

¹ E. C. L. R., vol. 34.

^{*} Id. 12.

² Id. 22.

⁴ Id. 11.

lunatics or their estate, in respect of contracts bond fide acted upon. The case of Niell v. Morley, 9 Ves. 478, before Sir William Grant, to the same effect, had been cited before by the counsel for the plaintiff.

As far as we are aware, this is the first case in which it has been broadly contended that the executed contracts of a lunatic must be dealt with as absolutely void, however entered into, and although perfectly fair, bond fide, reasonable, and without notice on the part of those who have dealt with the lunatic.

On looking into the cases at law, we find that, in Browne v. Joddrell, Lord Tenterden says: "I think the defence [of unsoundness of mind] will not avail, unless it be shown that the plaintiff imposed on the defendant." In Baxter v. The Earl of Portsmouth, 5 B. & C. 1701 (the nisi prius authority of which is in 2 C. & P. 178), Abbott, C. J., with the concurrence of the rest of the Court, laid down the same doctrine. In Dane v. Viscountess Kirkwall, Mr. Justice Patteson, in directing the jury, said: "It is not sufficient that Lady Kirkwall was of unsound mind, but you must be satisfied that the plaintiff knew it, and took advantage of it."

We are not disposed to lay down so general a proposition, as that all executed contracts bond fide entered into must be taken as valid, though one of the parties be of unsound mind; we think, however, that we may safely conclude, that when a person apparently of sound mind, and not known to be otherwise, enters into a contract for the purchase of property which is fair and bond fide, and which is executed and completed, and the property, the subject-matter of the contract, has been paid for and fully enjoyed, and cannot be restored so as to put the parties in statu quo, such contract cannot afterwards be set aside, either by the alleged lunatic, or those who represent him. And this is the present case, for it is the purchase of an annuity which has ceased.

On these grounds we think our judgment ought to be for the defendant.

Judgment for the defendant.

¹ E. C. L. R., vol. 11. Exchequer Chamber, May 29, 1849, 4

² Affirmed on error by the Court of Exch. 17.

NIELL v. MORLEY.

(9 Vesey, Jr. 478. High Court of Chancery, 1804.)

Contracts of Insane Persons; when Rescindable in Equity.

In May, 1800, the materials of Gunnersbury House, belonging to the defendant, were sold by auction. The sale continued three days; and Niell, a plumber at Brentford, attended every day, and purchased several lots, to the amount, in the whole, of 3,923l. 11s. 6d.

Immediately after the conclusion of the sale, he sold stock, paid considerable sums to the defendant on account, and gave him promissory notes, and a warrant of attorney to confess judgment, for other sums. He afterwards resold, at a loss, part of the materials so purchased. He had been afflicted with an inflammatory fever in 1796; and, upon the 25th of August, 1800, a commission of lunacy issued against him, under which he was found a lunatic, from the 1st of May, 1797, without lucid intervals. The defendant traversed the commission, upon which traverse a verdict was found for the crown.

The bill was filed by the lunatic and his committee, praying that the defendant may be decreed to repay to the committee the money paid by the lunatic; that the purchases of the several lots by the lunatic may be set aside, the notes delivered up, &c., and for an injunction.

A great deal of contradictory evidence was produced as to the state of mind of the lunatic, and his conduct at the sale; which on one side was represented to be most extravagant, in bidding far beyond the value, &c., and, on the other, directly the reverse; and, that on the last day of the sale a person named Andrews, having intimated that he was out of his mind, the defendant spoke to the auctioneer, who mentioned what he had heard to Niell; and that he was much enraged at Andrews, and threatened to bring an action; upon which the sale proceeded.

Mr. Richards and Mr. Cooke, for the plaintiff.

Mr. Romilly and Mr. Leach, for the defendant.

The Master of the Rolls (Sir William Grant). It is impossible to give the plaintiff the relief he prays, or any relief, except upon the ground that he was a lunatic at the time the contract took place. The establishment of that fact is indispensably necessary. That fact is controverted by the defendant. is also contended that, even admitting it, there is no equity. As to that fact, upon the evidence I should feel great doubt, and would have it tried. But it is said, it has been tried by the trial upon the traverse. It struck me at first that there was nothing definite in that, but that he was a lunatic at the time of the inquisition. An issue was tendered by the defendant as to the day of the contract; but no notice was taken of that day either by the replication or the finding of the jury, which is general; though probably it was meant to refer both to the time and manner, according to the issue tendered by the defendant; but it would have been more satisfactory to have found, in the terms of the issue tendered, that he was a lunatic at the day of the In Ex parte Ferne, the finding was precise with contract. reference to the particular day: namely, the marriage. The weight of evidence in this case, as applied to the particular time of the purchase, is in favor of the defendant; and, even if the evidence of insanity was clear, I must have held him to have enjoyed a lucid interval at that time upon the balance of the evidence.

But, suppose him to be considered in strictness a lunatic at that time, without lucid intervals, the question is, how far the plaintiff, upon that supposition even, is entitled to the equitable interposition of this Court to restore to him the possession of all the money he has paid in consequence of the contract.

The ground taken is, first, that whether the defendant did or did not know his situation, if the fact turns out that he was a lunatic, all his purchases are absolutely void; and all that followed upon them must be set aside: but also, that the defendant was informed by Andrews of the situation of this person, and therefore the conscience of the defendant is affected; that situation being upon the last day of the sale communicated to the defendant and the auctioneer. As to the latter, it is admitted, no notice was given of the lunacy till the last day. With the knowledge of his family, and the neighborhood, the plaintiff had

been attending that sale three days. It is strange that Andrews, or some other person, did not think fit to make that communication till the last day. The fact is that it was not communicated till then. All these people swear, not only that nothing in his conduct excited a suspicion of his situation, but that they looked upon him as remarkably intelligent, understanding the business, and conducting himself with singular propriety. I really do not impute great blame to the defendant and the auctioneer, for having done no more than they did; stopping the sale for a moment, to consider whether they should go on, and let him be a bidder. I do not believe the defendant gave credit to the information he received, and proceeded mala fide.

Then it comes to the mere fact, that he was a lunatic. question with reference to that, is, how far, under all the circumstances, this Court will interfere to set aside the whole of the lunatic's transactions, supposing them void at law. will depend very much upon the circumstances, and no general rule can be laid down upon it. With regard to purchases that have not been completed, and cases in which it is possible to replace the parties, there is no reason why this Court should not interfere to administer its ordinary equity as it can do that in general in a much better way than a Court of law; even supposing that Court would consider the mere law of the case in the same way as this Court would. But there may be other cases, in which the inconvenience would be so great, that this Court will leave the party to law. The inconvenience of carrying back the finding is extremely great, if that is to be followed through all the legal consequences. Assuming it to be the legal consequence, that every act of the lunatic subsequent to that time is absolutely void, nothing can be more inconvenient than for this Court to give effect to that legal consequence; setting aside every dealing in the course of his trade, giving an account of all he lost, the parties who have dealt with him to take the chance of the transaction being a losing one, and make it good; and the transaction being strictly void, this Court acting upon that; and though the parties cannot be replaced, obliging them to refund; though producing great injustice, that they cannot have that for which the money was paid, or cannot have it in the same man-In this case the defendant could not have it in the same ner. manner. The money was paid, the transaction completed, the

party suffered to deal with the property as his own; to sell it. If it sold to advantage, he or his family would have kept the profit, and the objection would not have been made; but now that it has turned out otherwise, not by circumstances to be imputed to the defendant (for there is nothing upon the evidence to show the loss was occasioned by an exorbitant price paid to him) a Court of equity is called upon to make the defendant refund, and to give the one party all the money he has paid, and to the other not what the property was worth, but what that property, under all the circumstances, produced to the lunatic. That would be most inequitable and unjust; and, if this is the principle, I must act upon it in all cases; where the lunacy is carried back ten or twelve years.

If the plaintiff is right, therefore, in saying, all this is void at law, let him resort to law, and recover, if he can. But there is no ground for a Court of equity to advance his remedy, when it is impossible to exercise the jurisdiction, so as to afford any chance of doing justice to the other party. Where this Court does interfere, it endeavors to put the parties in the same situation; that is, where the contract is void. Here, if the defendant could be placed in mala fide, as having notice, that would be a distinct and different ground for the interference of a Court of equity. But upon the simple ground that the contract may have been void (and whether it was or not I will not determine), the consequences are so extensive and so inconvenient, that I cannot think this Court ought to give the plaintiff the relief he prays.

The bill was dismissed without costs.

BAGSTER (OB BAXTER) v. EARL OF PORTSMOUTH.

(7 Dowl. & Ry. 614, s. c. 5 Barn. & Cress. 170; 2 C. & P. 178. Court of King's Bench, 1826.)

Lunatic liable for Necessaries.

Assumpsit on a contract for the hire and use of certain carriages and harness, with counts for goods sold and delivered, work and labor, &c. Plea, non assumpsit and issue thereon.

At the trial before ABBOTT, C. J., at the Middlesex sittings, after last Michaelmas term, the plaintiffs, who are coachmakers, gave in evidence two written contracts, signed by the defendant in 1817 and 1818, for the hire of a phaeton and a landau, respectively, with the use of suitable harness. The carriages had been made to the defendant's order; and he was to have them at so much per annum, for a certain number of years, the plaintiffs painting and keeping them in repair. Proof was given of the delivery of the carriages, and of the frequent use of them by the defendant after delivery. The answer to the action was, that the defendant was of insane mind at the time of making the contracts, and that by law the contracts of a lunatic are absolutely null and void, to all intents and purposes. was admitted on the part of the plaintiffs that, in consequence of a commission of lunacy issuing out of chancery in 1823, the defendant had been found and declared of insane mind, and unfit to have the government of himself, his lands, tenements, goods, and chattels, from the 1st of June, 1809, until the time of taking the inquisition; but it was argued that a lunatic was liable for necessaries suitable to his degree, on the same principle as an infant's liability is founded, notwithstanding his general incapacity to contract. The Lord Chief Justice was clearly of opinion, that the carriages, &c., in question, being suitable to the degree of the defendant, and as they had actually been ordered and enjoyed by him, the plaintiffs had a right to recover; and the plaintiffs had a verdict accordingly.

Brougham now moved for a rule nisi to enter a nonsuit, and referred to Stroud v. Marshall, Cro. Eliz. 398; Cross v. Andrews, id. 622; Fitzherbert, N. B. 202 d; Co. Litt. 247 a, b; Beverley's case, 4 Rep. 128 b; Yates v. Boen, Stra. 1104; Sergeson v. Sealy, 2 Atk. 412; and Faulder v. Silk, 3 Camp. 126.

ABBOTT, C. J. I was of opinion at the trial that the evidence produced in this case was not such as ought to defeat the plaintiff's right of recovering in the present action; considering that it was brought for the hire and use of carriages suited to the state and degree of the defendant, and by him actually ordered and enjoyed. That was on the ground on which I expressed my opinion. I, however, took care to distinguish this from the case of an unexecuted contract, entered into under such circumstances

as might lead any reasonable person to conclude that, at the time it was made, the party was of unsound mind. A case of the latter description would come under that class where imposition is practised upon, or advantage taken of the mental infirmity of the contracting party. To such cases I by no means wish to extend the opinion which I have formed in the present instance. My judgment is governed by a reference to the particular circumstances of this case; and it is not to be understood as embracing cases of the description to which I have alluded. Imbecility of mind may or may not be a defence in the case of an unexecuted contract. I am not saying that it would, nor does my present opinion decide that it would not.

BAYLEY, J. Imposition and fraud, generally speaking, are grounds for vacating all contracts; and with respect to the case of a person of unsound mind, if it can be proved that he has been defrauded, or an undue advantage taken of his imbecility, a Court of law will not enforce his contract. But where there is no imposition practised, and the goods supplied appear to be suitable for the condition and degree of the party receiving them, and which, in the ordinary habits of life, he would be likely to require, - I think the mere fact of his being of unsound mind, and incapacitated from making his own contracts will not deprive a tradesman of his right of suing in a Court of law for the value of the goods for which he has given credit. There may be great difficulty in predicating, on the first view, that a person is of unsound mind. It is well known that there are many individuals capable of speaking and acting most rationally, and who are of perfectly sound mind as to all the ordinary transactions of life, but on some particular subjects suffer under an aberration from sound reason. If persons of this description make an application for credit to a tradesman, who is not aware of their infirmity on some particular points, and he bond fide supplies them with goods which are suitable to their state and degree, it would be most unjust that his claim in a Court of law should be defeated by the fact, that a commission of lunacy had been awarded, and his debtors found on inquest to be insane. There is here no suggestion that the plaintiffs have not bond fide given the Exhibiting about him no appearance of meadefendant credit. tal incapacity, he goes to the plaintiff's house, and orders carriages, which are afterwards used by him. They are suitable to

his condition and degree in life, and such as would have been supplied by other persons, if not by the plaintiffs. Under these circumstances, I think law and justice require that the plaintiffs should be allowed to maintain an action against the lunatic. If the friends and relations of such a person are satisfied that he is incapable of conducting his own affairs, it is competent to them to adopt such measures as shall prevent him from exposure to imposition; but I think an imposition would be practised upon the plaintiffs if, under the circumstances of this particular case, the plea of lunacy could prevail.

Holroyd, J., concurred.

LITTLEDALE, J. There is no doubt that a deed, bond, or other specialty, may be avoided by a plea of lunacy, if at the time it was executed the contracting party was non compos mentis; but it seems to me that the rule of law in this respect does not apply to the case of necessaries supplied to a person who is, generally speaking, of sound mind, but insane on some particular subject. It is true that the inquisition in this case finds, retrospectively, that the defendant was of unsound mind, both before and at the time these contracts were entered into; but I think that does not make any difference.

Rule refused.

MORSE v. CRAWFORD.

(17 Vermont, 499. Supreme Court of Vermont, 1845.)

Idiocy or Lunacy as a Defence to an Action for a Tort.

TROVER for one ox. Plea, the general issue, and trial by the jury.

On trial it was conceded by the defendant, that, previous to May, 1844, the plaintiff delivered to the defendant a pair of oxen, to be kept by the defendant and worked sufficient to pay for their keeping, and that, on or about the 10th of May, 1844, the defendant killed one of the oxen, while at work with them, by putting a cord around his neck and strangling him.

The defendant's counsel then introduced testimony, tending to prove that the defendant, about thirty years ago, was insane, and that he had been insane at intervals ever since, and that he

was insane at the time the oxen were delivered to him by the plaintiff, and also at the time he killed the ox, and that this was known to the plaintiff.

The defendant's counsel then proposed to inquire of the witnesses, who were acquainted with the defendant and had conversed with him, their opinion as to his insanity; to this the plaintiff objected, for the reason that the witnesses were not professional men, and had no skill in such matters, and the testimony was excluded by the Court.

The defendant's counsel requested the Court to charge the jury that, if they found that the defendant was insane generally, and that the plaintiff suffered the oxen to go into his possession voluntarily, knowing that he was insane, and that he killed the ox, as the testimony tended to show, the plaintiff was not entitled to recover; and that, if they found that the defendant had been insane at intervals for the last thirty years, and had lucid intervals, the burden of proof was upon the plaintiff, to show that the defendant killed the ox in a lucid interval.

The Court instructed the jury that, if the plaintiff delivered the oxen to the defendant when he was insane, and this was known to the plaintiff, and that the defendant was insane at the time he killed the ox, the plaintiff was not entitled to recover, but that the burden of proof was upon the defendant, to show that, at the time of killing the ox, he was insane.

The jury returned a verdict for the plaintiff.

Exceptions by defendant.

A. Underwood, for defendant [cited Lester v. Pittsford, 7 Vt. 158; Clark v. State, 12 Ohio, 483, cited in 7 Law Reporter, No. 7, Title, Insanity; 3 Stark. Ev. 1707, note 2, and cases cited; 3 Stark. Ev. 1702, 1703; Attorney-General v. Parnther, cited in note to ib.].

Farr and Leslie, for plaintiff [cited 1 Chit. Pl. 65; 5 Bac. Abr. Tit. Trespass G, 184; 4 Bl. Com. 25, note 5; 3 Bac. Abr. 86, 89; 2 Saund. Pl. & Ev. 650; 14 Mass. 207; Ray's Med. Jur. of Insanity, 237, 238; 1 Sw. Dig. 531; Brown on Actions at Law, 218; 7 Vt. 161; 1 Conn. 9; 1 Sw. Dig. 749; 9 Mass. 225; 3 Stark. Ev. 1707, note; 1 Russell on Crimes, 7; Ib. 17, note].

The opinion of the Court was delivered by

Bennert, J. No question was made on the trial in regard to the ownership of the ox, or as to the fact that he was killed by

the defendant. The oxen, it seems, were bailed by the plaintiff to the defendant, to be used by him to pay for their keeping; and it appears, that, while the defendant had them in his possession under this contract, he destroyed one of them by strangling him.

The defence was put upon the ground that the defendant was insane, both at the time of the bailment, and also at the time he killed the ox, and that the plaintiff knew of his insanity when he bailed him the oxen. Can such a defence avail the defendant?

It is a common principle, that'a lunatic is liable for any tort which he may commit, though he is not punishable criminally. When one receives an injury from the act of another, this is a trespass, though done by mistake, or without design. quently, no reason can be assigned why a lunatic should not be The fact, that the plaintiff might have known that the defendant was insane when he let him have the oxen, cannot toll his right of action. To give to it that effect, it would be necessary to infer from it the plaintiff's assent to the trespass. Though this might evince a want of prudence in the plaintiff, in intrusting his oxen in such hands. Yet it is no evidence, tending to prove his assent to their destruction. It is possible that, if the evidence had shown that the plaintiff had bailed the oxen to an insane man, under an expectation that he might destroy them, so as to charge himself in trespass for their value, the rule might have been different. There might have been some little plausibility in claiming that this was equivalent to an assent, on the part of the plaintiff, to the trespass.

The bill of exceptions states, that the defendant's counsel proposed to ask the witnesses, who were acquainted with the defendant, and had conversed with him, their opinion as to his insanity, which the Court overruled. The counsel on both sides seem to consider the question, on this bill of exceptions, to be, whether the opinion of a witness (who is not a professional man) as devoid [derived] from personal observation of the defendant, can be given in evidence touching his insanity. The law is well settled, and especially in this State, that a witness may give his opinion in evidence, in connection with the facts upon which it is founded, and as derived from them; though he could not be allowed to give his opinion founded upon facts proved by

other witnesses. If we are to understand the bill of exceptions as the parties seem to understand it, we think the evidence would have been improperly rejected, in a case in which the insanity of the defendant was properly in issue. But in this case the plea of insanity, if made out on the trial, could not have availed the defendant; and of course there was no error in the rejection of this testimony which can avail the party. this view of the case the question, upon whom the burden of proof was cast, as to the defendant's sanity at the time when the oxen were bailed, and also when the ox was killed, became of no account. No sound objection can be urged against this form of action, as arising from the contract of bailment. It must, at all events, have been determined by the tortious act of the defendant. As it appears from the whole case that the plaintiff is entitled to judgment, the judgment of the County Court is affirmed.

Krom v. Schoonmaker.

(3 Barb, 647. Supreme Court of the State of New York, 1848.)

Lunacy as a Defence to Action of Tort. — Measure of Damages.

THIS WAS AN action for false imprisonment, tried before Mr. Justice Willard at the Ulster Circuit, in September, 1847. It appeared upon the trial that the defendant was a justice of the peace of the town of Rochester, and, as such justice, on the 4th day of January, 1847, issued a warrant in the following words:—

"Ulster county, ss. To any county of said county, greeting: In the name of the people of the State of New York, you are hereby commanded to take the body of Solomon J. Krom, and bring him before me forthwith, to answer said people in a complaint of perjury said to have happened in the Court of Common Pleas and General Sessions, at its last session at the Court house in Kingston in said county. Given under my hand this 4th day of January, 1847.

"John D. Schoonmaker."

The warrant was issued without any complaint being made, and delivered to one Frost, a constable, by whom the plaintiff was arrested, and on the same evening brought before the defendant. At the plaintiff's request the examination was adjourned until the next morning at Moses J. Schoonmaker's tavern. The defendant told Frost to keep the plaintiff in custody. After they left the defendant's house the constable allowed the plaintiff to go home, upon his promise to meet him at Schoonmaker's the next morning. The next day the plaintiff, with one Wyckoff, his counsel, went to Schoonmaker's tavern, and met the constable there; but the defendant did not come. The plaintiff was not released by the constable until sundown that day.

It was proved on the part of the defendant that when the plaintiff was brought before him on the warrant, his son told him "there was no use in minding Schoonmaker, as he was crazy and did not know what he was about." It was also proved that for nearly a year the defendant had confined himself to his room, allowing no person whatever to see him. One Westbrook another justice of the same town, testified that two or three days after the warrant was issued, the plaintiff and his son applied to him and stated that they wanted to take proceedings against Schoonmaker "under the statute of lunacy;" that they did not consider it safe for him to go at large, from the way he acted; he was mischievous and crazy, or something. ingly an examination was had before two justices. The plaintiff was the first witness examined; and, as evidence of the defendant's insanity, he related the circumstances connected with his arrest upon the warrant for perjury. He stated in particular what occurred when he was brought before the defendant. When asked what the warrant had been issued for, he said it was for perjury; that plaintiff had sworn false on the trial of Bell & DePuy, and had sworn false by the wholesale; that it was the fifth time he had sworn false; that either the plaintiff or the defendant had sworn false, and one of them must go to State's prison: he said he was not going to shoot himself until he had all those damned perjured rascals where they ought to be; that when plaintiff asked him if he could give bail, he said he wanted bail for \$20,000; and, upon being told by the plaintiff he would give it, he said he must give \$30,000; he was told

he could have that, and then he said he would not take that; that money would not save him. When he consented to adjourn the examination until the next morning, he said he was going to have all the judges there. After the adjournment he directed the constable to take charge of the prisoner. The constable hesitated, and he said: "Damn you, constable; do you not know your business?" He then called one Marble, who was not a constable, and said to him; "You have been constable long enough; you know your business." When asked who had made the complaint, he said it was R. H. DePuy; DePuy, being present, denied it. Then he said he was the complainant himself. Several other witnesses were examined before the justices, who proved various acts of the defendant, about the time the warrant was issued, evincing a disordered mind. The examination of the witnesses before the justices was read upon the trial without objection.

The Court charged the jury that the warrant was not a protection to the defendant, because no complaint was shown; but that, in order to justify a verdict for more than actual damages, the jury must be satisfied that at the time of issuing the warrant the defendant was of a sane mind; that sanity was to be presumed until insanity was proved; and that the jury must determine from the evidence whether the defendant was sane or insane.

The jury found a verdict for the plaintiff for \$350.

The defendant moved for a new trial upon a case.

M. Schoonmaker, for the plaintiff.

T. R. Westbrook, for the defendant.

By the Court, Harris, J. A lunatic cannot be punished for crime, but he may be sued for an injury done to another. He is not a free agent, capable of intelligent, voluntary action, and therefore is incapable of a guilty intent, which is the very essence of crime; but a civil action, to recover damages for an injury, may be maintained against him, because the intent with which the act is done is not material. But the principle upon which this distinction rests reaches also to the measure of damages in a civil action. Ordinarily, in an action for a personal injury, the amount of damages is, at least to a considerable extent, governed by the motive which influenced the party in committing the act. Thus it is usual, and as proper as it is usual,

for the Court, upon the trial of an action for an assault and battery, to instruct the jury that the action is maintainable even though the injury was accidental; that if intentional, yet when the act is done under the excitement of strong provocation, it is a proper ground for the mitigation of damages. And, on the contrary, that when the act is committed deliberately or maliciously, it is good ground for increasing damages. In short, in such cases, the damages are graduated by the intent of the party committing the injury. But in respect to the lunatic, as he has properly no will, it follows that the only proper measure of damages in an action against him for a wrong is the mere compensation of the party injured.

The charge of the learned judge upon the trial was, therefore, in this respect, entirely correct.

But I think sufficient weight was not given, either by the judge or the jury, to the fact that the plaintiff himself, immediately after he was discharged from arrest upon the warrant against him, made application, according to the provisions of the act in relation to the safe-keeping and care of lunatics (1 R. S. 635, § 8), for a warrant to apprehend and confine the defendant as a lunatic.

The judge charged the jury that, as a general rule, sanity is to be presumed until the contrary is made to appear. So far, perhaps the charge was correct, but I think he should have further instructed the jury that the fact that the plaintiff had, at the time, made application for the confinement of the defendant as a lunatic, and had founded that application upon the circumstances of his own arrest upon the warrant issued by the defendant, was strong, if not conclusive, evidence of the defendant's insanity, in the absence of all proof to show that the plaintiff was in fact mistaken, or even thought he was mistaken, when he made the application. The fact that the plaintiff, and, as it would seem, all who had any knowledge of the proceedings against the plaintiff for perjury, believed those proceedings to have been the result of the defendant's insanity, was not, I think, sufficiently considered. The jury should have been instructed that they had the right, at least, to take the plaintiff's judgment as to the state of the defendant's mind as conclusive against him, until he should himself show that he had been mistaken in his opinion. There was no such evidence; and, from

the facts and circumstances detailed in the case, I think I should have come to the same conclusion that the plaintiff did, that the issuing of the warrant was but the freak of a madman. The power of the Court to award a new trial ought to be cautiously exercised when the error complained of relates only to the amount of damages; but under all the circumstances of this case, and taking into consideration the novelty of the defence, I think it is one of those cases in which a due regard to the ends of justice, and a discreet exercise of the power of the Court, fully warrant us in directing that the cause should be submitted to another jury.

New trial granted.

DEAF AND DUMB PERSONS.

Brower v. Fisher.

(4 Johns. Ch. 441. Court of Chancery of New York, 1820.)

Capacity of Deaf and Dumb Persons.

In March, 1810, the plaintiff purchased of the defendant his right or share in his father's real and personal estate, which was subject to debts and incumbrances, for \$375. On receiving a deed of conveyance from the defendant, the plaintiff gave him a note for the consideration money, payable in May, 1811. The plaintiff being afterwards indebted to the defendant in the sum of about \$70, he gave a bond to the defendant for the amount of the note and that debt, making \$479. The bill stated that the defendant, at the time of the purchase, was of lawful age. That he was born deaf and dumb, and had continued so from his nativity, but had sufficient intelligence to communicate his ideas by signs, to those who were intimate with him, so as to make himself well understood. That the defendant, at the time of the purchase, was assisted by his mother, and by W. Barker, a friend of the defendant, and that the price agreed to be paid was a full and fair consideration for his interest, under the circumstances. That the plaintiff was, at the time, advised that no valid legal objection could be made to the transaction. That the defendant has since brought an action at law against the plaintiff on the bond, and recovered a judgment for \$666.16, the principal and interest due on the bond, which the plaintiff was willing to pay into Court, or in any way the Court might direct, as the plaintiff, having been advised that the deed of conveyance from the defendant to him was not valid, for want of legal capacity in the defendant to contract, did not feel safe in paying the money to the defendant; believing that, if the title should prove defective, he should be without redress against the defendant, who had become intemperate, and was wasting his

property. That an execution had been taken out on the judgment, &c.

An injunction was issued to stay the execution, according to the prayer of the bill.

The defendant answered the bill, admitting the facts and allegations it contained.

On the petition of the plaintiff, a commission of lunacy was issued to inquire whether the defendant was compos mentis or not; and by the inquisition returned, it was found that the defendant was born deaf and dumb, and had continued so from his nativity; but that, notwithstanding, he had sufficient intelligence for the management of himself and his property, and was capable of communicating, by signs and motions, with persons with whom he was intimate, so as to be well understood, and of understanding them; that the jurors were of opinion that the defendant was not a lunatic, unless the fact of his having been born deaf and dumb, in judgment of law, made him a lunatic, and that the defendant conveyed all his title and interest in his father's estate to the plaintiff for \$875, which was a fair consideration for the same.

On filing the inquisition, the injunction was dissolved, and the plaintiff paid the amount of the judgment, with costs.

The cause was now set down for hearing on the bill and answer, no testimony having been taken by either party; and the only question was, whether the bill was to be dismissed with or without costs.

- A. McDonald, for the plaintiff.
- J. Smith, for the defendant.

The CHANCELLOR. The sole question in this case is, whether the bill shall be dismissed with or without costs. The plaintiff claims no relief after the inquisition which has been returned.

Upon the finding of the jury under the commission in nature of a writ de lunatico inquirendo, I refused to appoint a committee, and adjudged that the defendant was not to be deemed an idiot from the mere circumstance of being born deaf and dumb.

This is a clear settled rule, and numerous instances have occurred in which such afflicted persons have demonstrably shown that they were intelligent, and capable of intellectual and moral cultivation. In Elliot's case (Carter, 53), Bridgman, C. J., and the other judges of the C. B., admitted a woman born deaf and

dumb to levy a fine after due examination of her. He mentioned, also, the case of one Hill, who was born deaf and dumb, and who was examined by Judge Warburton, and found intelligent, and admitted to levy a fine. So Lord Hardwicke, in Dickenson v. Blisset (Dick. 268), admitted a person born deaf and dumb, upon being examined by him after she came of age, to take possession of her real estate.

Notwithstanding these authorities, the bill does not appear to have been filed vexatiously, but rather to obtain, for greater caution, the opinion of the Court on a point which had been left quite doubtful in many of the books, and which had never received any discussion here. It is stated, in Bracton (De Exceptionibus, lib. 5, c. 20), to be a good exception taken by the tenant: "Si persona petentis fuerit surdus et mutus naturaliter, hoc est, nativitate;" for it is said, "acquirere non potest, et per officium judicis invenienda sunt ei necessaria quoad vixerit;" and he takes it for granted, that such a person is placed under a curator, and that he must sue in assise, sicut minor. So it is said in Brooke (Eschete, pl. 4, that "videtur qui surdus et mutus ne poet faire alienation;" and the distinction taken was (Dy. 56 a, note 13) that, if deaf and dumb from his birth, he was non compos, but not if so by casualty. By the civil law, it was also generally understood and laid down that a person born deaf and dumb was incapable of making a will, and he was deemed a fit subject for a curator or guardian. Inst. 1, 23, 24, and Ferniere, h. t., and Inst. 2, 12, 3, and Ferrier and Vinnius, h. t. Perhaps, after all, the presumption, in the first instance, is that every such person is incompetent. It is a reasonable presumption, in order to insure protection and prevent fraud, and is founded on the notorious fact that the want of hearing and speech exceedingly cramps the powers and limits the range of the

The author of Fleta (lib. 6, c. 40) supposes a person born deaf or dumb to be incapable of enfeoffing, &c.: "Competit etiam exceptio tenenti propter defectum naturæ petentis, vel si naturaliter a nativitate surdus fuerit aut mutus, tales enim adquirere non poterunt, nec alienare, quia non consentire, quod non est de tarde mutis

vel surdis, quibus dandi sunt curatores et tutores," &c But Coke (Co. Litt. 42 b), says, "a man deafe, dumb, or blind, so that he hath understanding and sound memory, albeit he expresse his intention by signs, may infeoffe," &c., though a man, deaf, dumb, and blind from his nativity cannot.

mind. The failure of the organs requisite for general intercourse and communion with mankind, oppresses the understanding; "affigat humo divinæ particulam auræ." A special examination, to repel the inference of mental imbecility, seems always to have been required; and this presumption was all that was intended by the civil law, according to the construction of the ecclesiastical courts; for a person born deaf and dumb was allowed to make a will, if it appeared, upon sufficient proof, that he had the requisite understanding and desire. Swinb. part 2, § 10.

I am satisfied that the plaintiff is justly to be exempted from the charge of a groundless and vexatious inquiry, and the course is not to punish the prosecutor of a charge of lunacy with costs, if the prosecution has been conducted in good faith and upon probable grounds. 1 Collinson on Lun. 461, 464. I shall, therefore, dismiss the bill without costs.

Decree accordingly.

DRUNKENNESS.

BARRETT v. BUXTON.

(2 Aiken, 167. Supreme Court of Vermont, 1826.)

Whether Intoxication is a Defence to a Contract.

Assumpsit on a promissory note, for the sum of one thousand dollars and the interest. Plea: the general issue.

The case was, the plaintiff and defendant had entered into a written contract for an exchange of certain real estate, and the note was given on that occasion, by the defendant to the plaintiff, for the difference money agreed to be paid between the two parcels of real estate. The plaintiff afterwards executed a deed on his part, according to the contract, and tendered it to the defendant. The defendant refused to accept the deed or pay the note.

These facts being proved on the trial of the issue, the defendant offered testimony tending to prove that at the time of executing the said contract and note, and of making the bargain therein specified, he was drunk, and thereby incapacitated to judge of the nature or consequences of said bargain.

But the plaintiff objecting, the Court refused to admit said testimony, unless the same could be accompanied with testimony tending to prove that the said drunkenness was procured by or at the instigation of the plaintiff. To which decision the defendant excepted.

The defendant also offered testimony tending to prove that the farm which he had agreed to convey to the plaintiff at the time of giving said note, was actually worth as much or more than the premises which the plaintiff had agreed to convey to the defendant in exchange. This testimony being objected to, the Court refused to receive; and to this decision, also, the defendant excepted.

A verdict was returned for the plaintiff; and the defendant now moved that the same be set aside and for a new trial, for the reasons apparent in the exceptions aforesaid.

The counsel for the defendant, in support of the motion, relied on a recent decision of this Court in Addison County. They also cited 1 Chitt. Pl. 470, 479; 3 Campb. 33, Pitt v. Smith; Bull. N. P. 172.

For the plaintiff, it was contended that drunkenness will not relieve a man, for it is a great offence and aggravates the act done, and is no excuse for him, unless it was procured by the contrivance or management of the man who received the deed, or made the contract with him. To avoid any contract made or deed given by the party when drunk, would be taking advantage of his own wrong, which no man is permitted to do. 4 Co. 128 b, Beverley's case; 1 Mad. Ch. 238; 1 Fonblanque, 60; 3 Campb. 85; 4 Mass. 161, Churchill v. Suter.

The opinion of the Court was pronounced by

PRENTISS, J. This is an action upon a promissory note, executed by the defendant to the plaintiff for the sum of \$1,000, being the difference agreed to be paid the plaintiff on a contract for the exchange of lands. The agreement of exchange was in writing, and the plaintiff afterwards tendered to the defendant a deed, in performance of his part of the agreement, which the defendant refused. The defendant offered evidence to prove that, at the time of executing the note and agreement, he was intoxicated, and thereby incapable of judging of the nature and consequences of the bargain.

The Court refused to admit the evidence without proof that the intoxication was procured by the plaintiff.

The question is, whether the evidence was admissible as a defence to the action; or, in other words, whether the defendant could be allowed to set up his intoxication to avoid the contract.

This question has been already substantially decided by the Court on the present circuit; but the importance of the question and the magnitude of the demand in this case have led us to give it further consideration. According to Beverley's case, 4 Co. 123 b, a party cannot set up intoxication in avoidance of his contract under any circumstances. Although Lord Coke admits that a drunkard, for the time of his drunkenness, is non compose

mentis, yet he says, "his drunkenness shall not extenuate his act or offence, but doth aggravate his offence, and doth not derogate from his act, as well touching his life, lands, and goods, as any thing that concerns him." He makes no distinction between criminal and civil cases, nor intimates any qualification of his doctrine, on the ground of the drunkenness being procured by the contrivance of another who would profit by it. His doctrine is general, and without any qualification whatever; and, connected with it, he holds that a party shall not be allowed to stultify himself, or disable himself, on the ground of idiocy or lunacy. The latter proposition is supported, it is true, by two or three cases in the Year Books, during the reigns of Edward III. and Henry VI., by Littleton, § 405, who lived in the time of Henry VI.; and by Stroud v. Marshall, Cro. Eliz. 398, and Cross v. Andrews, Cro. Eliz. 622: Sir William Blackstone, however, who traces the progress of this notion, as he calls it, considers it contrary to reason, and shows that such was not the ancient common law. The register, it appears, contains a writ for the alienor himself, to recover lands aliened by him during his insanity; and Britton states, that insanity is a sufficient plea for a man to avoid his own bond. Fitzherbert also contends, "that it stands with reason that a man should show how he was visited by the act of God with infirmity, by which he lost his memory and discretion Blackstone considers the rule as having been for a time." handed down from the loose cases in the times of Edw. III. and Henry VI., founded upon the absurd reasoning that a man cannot know, in his sanity, what he did when he was non compos mentis, and he says, later opinions, feeling the inconvenience of the rule, have, in many points, endeavored to restrain it. 2 Bl. Comm. In Thompson v. Leach, 3 Mod. 301, it was held that the deed of a man non compos mentis was not merely voidable, but was void ab initio, for want of capacity to bind himself or his In Yates v. Boen, 2 Stra. 1104, the defendant pleaded property. non est factum to debt on articles, and, upon the trial, offered to give lunacy in evidence. The Chief Justice at first thought it ought not to be admitted, upon the rule in Beverley's case, that a man shall not stultify himself; but on the authority of Smith v. Carr, in 1728, where Chief Baron Pengelley, in a like case, admitted it; and, on considering the case of Thompson v. Leach, the Chief Justice suffered it to be given in evidence, and the

plaintiff became nonsuit. The most approved elementary writers and compilers of the law refer to this case, and lay it down as settled law that lunacy may be given in evidence on the plea of non est factum by the party himself; and it is said to have been so ruled by Lord Mansfield in Chamberlain of London v. Evans, mentioned in note to 1 Chitt. Pl. 470. In this country, it has been decided in several instances that a party may take advantage of his own disability, and avoid his contract, by showing that he was insane and incapable of contracting. Rice v. Peet, 15 Johns. 503; Webster v. Woodford, 3 Day, 90. These decisions are founded in the law of nature and of justice, and go upon the plain and true ground that the contract of a party non compos mentis is absolutely void, and not binding upon him. The rule in Beverley's case as to lunacy, therefore, is not only opposed to the ancient common law and numerous authorities of great weight, but to the principles of natural right and justice, and cannot be recognized as law; and it is apprehended that the case is as little to be regarded as authority in respect to intoxication, which rests essentially upon the same principle.

It is laid down in Buller's N. P. 172, and appears to have been decided by Lord Holt in Cole v. Robins, there cited, that the defendant may give in evidence, under the plea of non est factum to a bond, that he was made to sign it when he was so drunk that he did not know what he did. And in Pitt v. Smith, 3 Camp. Cas. 33, where an objection was made to an attesting witness being asked whether the defendant was not in a complete state of intoxication when he executed the agreement, Lord Ellenborough says: "You have alleged that there was an agreement between the parties; but there was no agreement, if the defendant was intoxicated in the manner supposed. He had not an agreeing mind. Intoxication is good evidence upon a plea of non est factum to a deed, of non concessit to a grant, and of non assumpsit to a promise." Chitty, Selwyn, and Phillips lay down the same doctrine; and Judge Swift, in his Digest, says that an agreement signed by a man in a complete state of intoxication is void. 1 Chitty, Pl. 470; Selw. N. P. 563; 1 Phil. Ev. 128; 1 Swift's Dig. 173. In these various authorities it is laid down generally, and without any qualification, that drunkenness is a defence, and no intimation is made of any distinction, founded on the intoxication being procured

by the party claiming the benefit of the contract. It is true that in Johnson v. Medlicott, 3 P. Wms. 130, that circumstance was considered essential to entitle the party to relief in equity against his contract. Sir Joseph Jekyll held that the having been in drink was not any reason to relieve a man against his deed or agreement, unless the party was drawn into drink by the management or contrivance of him who gained the deed. But from what is said in 1 Fonbl. Eq. 62, it would not seem that the author considered this circumstance as indispensable. He says equity will relieve, especially if the drunkenness were caused by the fraud or contrivance of the other party, and he is so excessively drunk that he is utterly deprived of the use of his reason or understanding; for it can by no means be a serious and deliberate consent, and without this no contract can be binding by the law of nature. In Spiers v. Higgins, decided at the Rolls in 1814, and cited in 1 Mad. Ch. 304, a bill filed for a specific performance of an agreement, which was entered into with the defendant when drunk, was dismissed with costs, although the plaintiff did not contribute to make the defendant drunk.

On principle, it would seem impossible to maintain that a contract entered into by a party when in a complete state of intoxication, and deprived of the use of his reason, is binding upon him, whether he was drawn into that situation by the contrivance of the other party or not. It is an elementary principle of law, that it is of the essence of every contract that the party to be bound should consent to whatever is stipulated, otherwise no obligation is imposed upon him. If he has not the command of his reason, he has not the power to give his assent, and is incapable of entering into a contract to bind himself. Accordingly, Pothier holds (vol. i. c. 1, a 4, § 1) that ebriety, when it is such as to take away the use of reason, renders the person who is in that condition, while it continues, unable to contract, since it renders him incapable of assent. And it seems Heineccius and Puffendorf both consider contracts entered into · under such circumstances as invalid. By the Scotch law, also, an obligation granted by a person, while he is in a state of absolute and total drunkenness, is ineffectual, because the grantor is incapable of consent; but a lesser degree of drunkenness, which only darkens reason, is not sufficient. Ersk. Inst. 447. The author of the late excellent treatise on the principles and

practice of the Court of Chancery, after reviewing the various cases in equity on the subject and citing the Scotch law with approbation, observes: "The distinction thus taken seems reasonable; for it never can be said that a person absolutely drunk has that freedom of mind generally esteemed necessary to a deliberate consent to a contract; the reasoning faculty is for a time deposed. At law it has been held that upon non est factum the defendant may give in evidence that they made him sign the bond when he was so drunk that he did not know what he did. So a will made by a drunken man is invalid. And will a Court of Equity be less indulgent to human frailty? It seems to be a fraud to make a contract with a man who is so drunk as to be incapable of deliberation." 1 Mad. Ch. 302. Mr. Maddock seems to consider it as settled that, at law, complete intoxication is a defence, and that it ought to be a sufficient ground for relief in equity; and, indeed, it would seem difficult to come to a different conclusion. As it respects crimes and torts, sound policy forbids that intoxication should be an excuse; for, if it were, under actual or feigned intoxication the most atrocious crimes and injuries might be committed with impunity. But in questions of mere civil concern, arising ex contractu, and affecting the rights of property merely, policy does not require that any one should derive an unjust profit from a bargain made with a person in a state of intoxication, although brought upon himself by his own fault, or that he should be a prey to the arts and circumvention of others, and be ruined, or even embarrassed, by a bargain, when thus deprived of his reason. It is a violation of moral duty to take advantage of a man in that defenceless situation, and draw him into a contract; and if the intoxication is such as to deprive him of the use of his reason, it cannot be very material whether it was procured by the other party, or was purely voluntary. The former circumstance would only stamp the transaction with a deeper turpitude, and make it a more aggravated fraud. The evidence which was offered and rejected at the trial in the case before us went not only to show that the defendant was so intoxicated at the time of giving the note as to be incapable of the exercise of his understanding, but that the contract was grossly unequal and unreasonable; and, both on principle and authority, we think the evidence was admissible, and that a new trial must be granted.

New trial granted.

GORE v. GIBSON.

(18 M. & W. 628, s. c. 9 Jur. 140. Court of Exchequer, 1845.)

Whether Intoxication is a Defence to a Contract.

Assumpsit by the indorsee against the indorser of a bill of exchange. Plea, that, before and at the time when the defendant indorsed the said bill of exchange, he was so drunken, intoxicated, and under the influence of liquor, and thereby so entirely deprived of sense, understanding; and the use of his reason, as to be unable to comprehend the meaning, object, nature, or effect of the said indorsement, or to contract or promise thereby; of all which premises the plaintiff, before and at the time when the defendant so indorsed the said bill of exchange, and always since, had full knowledge and notice. Verification.

Demurrer and joinder.

Horn, in support of the demurrer. The plea is bad. It is no answer to the declaration for the defendant to say that he indorsed the bill when in a state of intoxication. The consideration for the indorsement is admitted. To make the plea good, the defendant ought to have shown that the intoxication was procured by the plaintiff, or that he took advantage of it. Mere notice is not equivalent to fraud, but is only evidence of it; knowledge is not necessarily fraudulent knowledge. According to the old authorities, a man was not allowed to stultify himself by alleging his own incapacity to contract, whether from insanity, or drunkenness, which was held a crime in itself, and therefore as not affording any excuse for other crimes, or for avoiding a civil contract. Co. Litt. 274 b; Beverley's case, 4 Rep. 123 b. That rule has certainly been relaxed in modern times, but it still holds good thus far, that, to make drunkenness a defence, it must be shown to have been brought about by the fraud or contrivance of the other party. Besides, it is consistent with this plea, that the indorsement may have been by procuration, given when the defendant was sober. [ALDERSON, B. There is a material distinction between what a drunkard does against another in invitum, and what a party does with

respect to him by way of contract, knowing him to be drunk.] In Johnson v. Medlicott, 3 P. Wms. 130, note a, Jekyll, M. R., says: "The having been in drink is not any reason to relieve any man against any deed or agreement gained from him when in those circumstances, for this were to encourage drunkenness; secus if, through the management or contrivance of him who gained the deed, the party from whom such deed has been gained was drawn into drink." This was recognized as law by Sir W. GRANT, in Cooke v. Clayworth, 18 Ves. 12. So, in Newland on Contracts, p. 365, it is said: "Though a man was in a state of drunkenness when he entered into an agreement, equity will not set it aside on that ground alone, especially if it be reasonable; as, for instance, to settle family dispute." The same rule applies to lunacy. Baxter v. Earl of Portsmouth, 5 B. & C. 170;1 Browne v. Joddrell, M. & Malk. 105; and this is a stronger case, because a lunatic is not a criminal. [PARKE, B. Those authorities do not state the degree of drunkenness. If the party was only partially drunk, so that he nevertheless knew what he was about, equity would not relieve; but here the plea states, that the defendant was so entirely deprived of the use of his reason that he could not comprehend the meaning or effect of the indorsement.] He could not be entirely deprived of the use of his reason, for he admits that he indorsed the bill to the plaintiff, so as to give him a title. [Pollock, C. B. He merely admits the mechanical act of writing his name, which may be performed without any reference to the consequences. According to your argument, if a man does the formal act of indorsement, he can have no defence. PARKE, B. He admits a prima facie case on the part of the plaintiff, by admitting the manual act of indorsement, but excuses it by saying that he was non compos at the time]. There is no reason of policy why the defendant should be allowed, by reason of his drunkenness, which is voluntary, to dispute his indorsement of a bill given for good consideration. [Pollock, C. B. A contract may be implied by law in many cases, even where the party protested against any contract; the law says he did contract, because he ought to have done so. that ground the creditor might recover against him when sober for necessaries supplied to him when drunk.] There can be no difference in principle between an express and an implied contract, for this purpose. Suppose it were a mere verbal contract for payment for goods. [Alderson, B. Then the keeping them when he is sober raises the contract.] But further, the plea is bad, as amounting to an argumentative traverse of the indorsement, which, according to Marston v. Allen, 8 M. & W. 494, means an act done with the intention of transferring the property in the bill.

Pearson, contra, was stopped by the Court.

Pollock, C. B. I am of opinion that the defendant is entitled to our judgment. The authorities on this subject are collected in Kent's Commentaries, vol. 2, p. 451, where the author observes, that although formerly it was considered that a man should be liable upon a contract made by him when in a state of intoxication, on the ground that he should not be allowed to stultify himself, the result of the modern authorities is, that no contract made by a person in that state, when he does not know the consequences of his act, is binding upon him. That doctrine appears to me to be in accordance with reason and justice. With regard, however, to contracts which it is sought to avoid on the ground of intoxication, there is a distinction between express and implied contracts. Where the right of action is grounded upon a specific, distinct contract, requiring the assent of both parties, and one of them is incapable of assenting, in such a case there can be no binding contract; but in many cases the law does not require an actual agreement between the parties, but implies a contract from the circumstances; in fact, the law itself makes the contract for the parties. Thus in actions for money had and received to the plaintiff's use, or money paid by him to the defendant's use, the action may lie against the defendant, even though he may have protested against such a contract. tradesman who supplies a drunken man with necessaries may recover the price of them if the party keeps them when he becomes sober, although a count for goods bargained and sold would fail. In this case, the defendant is still liable for the consideration for his indorsement, although the indorsement itself can give the plaintiff no title.

PARKE, B. With respect to the authorities cited for the plaintiff, in which courts of equity have refused to relieve parties against contracts made by them when in a state of intoxication, those authorities may possibly have reference to a case of partial

drunkenness. But where the party, when he enters into the contract is in such a state of drunkenness as not to know what he is doing, and particularly when it appears that this was known to the other party, the contract is void altogether, and he cannot be compelled to perform it. A person who takes an obligation from another under such circumstances, is guilty of actual fraud. The modern decisions have qualified the old doctrine, that a man shall not be allowed to allege his own lunacy or intoxication; and total drunkenness is now held to be a defence. Yates v. Boen, 2 Stra. 1104; Cole v. Robins, Bull. N. P. 172; Cooke v. Clayworth. The averment in this plea, that the defendant indorsed the bill, means merely that he wrote his name upon it; then the plea goes on to state, as matter of avoidance, that the act of so writing his name is not obligatory on him, because he was in fact non compos mentis when he did it. The plaintiff contends that this defence might be given in evidence under a plea denying the indorsement; but that is not so, because we have already held that indorsement means, in the first instance, the mere act of writing the name upon the bill.

ALDERSON, B. A party, even in a state of complete drunkenness, may be liable in cases where the contract is necessary for his preservation, as in the case of a supply of actual necessaries; so, also, where he keeps the goods when he is sober. The ground of his liability there is, that an implied contract to pay for the goods arises from his conduct when he is sober; although I doubt much whether, if he repudiated the contract when sober, any action could be maintained upon it. Here the action is necessarily brought upon the contract itself; and when it is shown that the contract by indorsement was made when the defendant was in such a state of drunkenness that he did not know what he was doing, and especially when it appears that the plaintiff knew it, I cannot doubt that the contract is void altogether. It is just the same as if the defendant had written his name upon the bill in his sleep, in a state of somnambulism.

Leave to the plaintiff to amend, on payment of costs, by with-drawing the demurrer and taking issue, otherwise

Judgment for the defendant.

COOKE v. CLAYWORTH.

(18 Ves. Jr. 12. Court of the Master of the Rolls, 1811.)

Intoxication; when a Ground of Relief in Equity.

THE bill prayed that an agreement in writing, executed by the plaintiff, may be declared fraudulent and void as against him; and may be decreed to be delivered up to be cancelled, and an injunction.

The plaintiff by his bill represented that on the 11th of June, 1807, he met by appointment at Spilsby, in the county of Lincoln, several persons, of whom he had made purchases, in order to pay them, one of those persons being the defendant, Taylor; and, after that business was concluded, the plaintiff was prevailed upon to drink until he was intoxicated; that in that state he left Spilsby about six in the evening, accompanied by Taylor; and they stopped at the house of the other defendant, Clayworth, to whom also the plaintiff had a payment to make. They found him at home drinking with some other persons, and they all continued drinking for a considerable time; the plaintiff returning home about half-past two in a state of complete intoxication; and the agreement was obtained from him while in that state, and utterly unable to understand what he was doing.

The defendants, by their answer, denied that the plaintiff was solicited to drink, stating that he continued to do so of his own free will, and was disqualified from transacting business of difficulty and importance; that the agreement arose from Clayworth's stating a dispute with his landlord, who threatened to turn him out of his farm, upon which the plaintiff made the offer. The answer then stated the agreement, which was most inaccurately expressed, in effect, that Cooke agrees to let all the lands and tenements he occupied in the parish of Brough, or elsewhere; and Clayworth and Taylor agree to take the land to rent for twenty years, to commence at Lady-day, 1808, stating the terms; and that Cooke agrees to give possession at the time before mentioned; that it was signed by all the parties on the 11th of May, 1807, witnessed by Robert Marshall; that it was prepared by

Marshall, but dictated by the plaintiff, and was executed at twelve o'clock at night.

It was proved that Marshall, a schoolmaster, was called out of bed to prepare the agreement. There was much contradiction in the evidence as to the plaintiff's situation, some of the witnesses stating that he was in a high degree of intoxication, and came home in that situation about two in the morning; others representing him as perfectly sober, and fully competent to transact business.

Sir Samuel Romilly and Mr. Horne, for the plaintiff.

This is an agreement, fraudulently obtained from a man while in a state of intoxication; which is apparent on the face of the agreement, compared with the account given by the defendant and the evidence. The evidence upon the face of the instrument is the strongest; the parts interpolated, making this a binding agreement upon the plaintiff, as a demise, being in a different ink. Independent of the intoxication, a Court of equity would not only refuse to perform such an agreement, but would decree it to be delivered up. This cannot be supported upon the primciple stated in Cory v. Cory, as a reasonable, proper agreement; and there is evidence that he was drawn in to drink, according to the distinction taken in Johnson v. Medlicott.² In that respect this is distinguished from the case of Cragg v. Holme, where the Court refused a specific performance of an agreement made in a state of intoxication, though no advantage was taken, a Court of equity not interposing on either side in the common case of intoxication; but, if the party is brought into that state by him who obtains and seeks advantage from the agreement, the intoxication is part of the fraud which gives the right to the relief.

The rule, however, against interposing on either side in the common case of intoxication cannot apply in this instance. This agreement, as it has been altered, though not so originally, amounts to a demise; and upon that ground the Lord Chancellor,

- ¹ 1 Ves. 19.
- 2 3 P. Will. 131, note a.
- At the Rolls, May, 1811. From a MS. note, it was stated that the bill for a specific performance was dismissed without costs, though the plaintiff had not contributed to make the

defendant drunk, or taken any advantage of his situation, and the Master of the Rolls said he would not have decreed the agreement to be delivered up; that the Court would not act on either side.

upon the terms of giving immediate possession, if the bill should be dismissed, continued the injunction against an ejectment brought by the defendant. The bill in truth, therefore, seeks to have delivered up, not an agreement, but a lease; which appears in evidence to have been converted into a lease from an agreement, after it was signed.

Mr. Hart, and Mr. William Agar, for the defendant, distinguished this from a bill for the performance of a contract; insisting that to obtain this relief the plaintiff must show a specific fraud practised upon him, making it unconscientious to retain the effect of it; the rule being clear, that intoxication simply gives no protection; the responsibility is thrown upon the party himself, unless he can show that undue advantage was taken of his situation by those who brought him into it with a view to that advantage.

Feb. 18. The Master of the Rolls (Sir William Grant). Retaining the opinion which I stated in the case that was alluded to in the argument, I think a Court of equity ought not to give its assistance to a person who has obtained an agreement or deed from another in a state of intoxication; and on the other hand ought not to assist a person to get rid of any agreement or deed, merely upon the ground of his having been intoxicated at the time: I say merely upon that ground; as, if there was, as Lord Hardwicke expresses it in Cory v. Cory, any unfair advantage made of his situation, or, as Sir Joseph Jekyll says in Johnson v. Medlicott, any contrivance or management to draw him into drink, he might be a proper object of relief in a Court of equity. As to that extreme case of intoxication that deprives a man of his reason, I apprehend that even at law it would invalidate a deed obtained from him while in that condition.

After a very attentive consideration of the evidence in this case, I can find no ground on which, upon the supposed state of intoxication of the plaintiff, the Court could be warranted in decreeing this deed or agreement to be delivered up to be cancelled. There is a contrariety of evidence as to the fact of intoxication, upon which it is not easy for this Court to decide. There are three witnesses, who all swear that at the time of execution the plaintiff was perfectly sober and capable of busi-

Dunnage v. White, 1 Swanst. 137. 8 3 P. Will. 130, note a.

² 1 Ves. 19.

ness; Marshall indeed says he was as capable of transacting business to any extent as ever he was in his life. Whatever difficulty I may have in believing this, after all the other evidence that has been produced, I should hesitate to determine a fact so controverted without the intervention of a jury.

But, supposing the intoxication proved to a considerable extent, still the inquiry would remain, whether the conduct of the defendants has been such as to furnish ground for setting aside this agreement. It is admitted that there was no previous design in bringing about the meeting at the defendant's house; the bill stating that the plaintiff's calling there was the proposition of the plaintiff to Taylor. As to the plaintiff's being drawn into drink by contrivance and management, it is to be observed that the drinking was not introduced on account of his coming there, nor after he came there; but, a company engaged in drinking, he joined them. One witness, Mary Hall, says the plaintiff was pressed, and almost forced, by Clayworth to drink; but her testimony, not being corroborated by any other witness, cannot prevail against the denial of that fact by the answer.

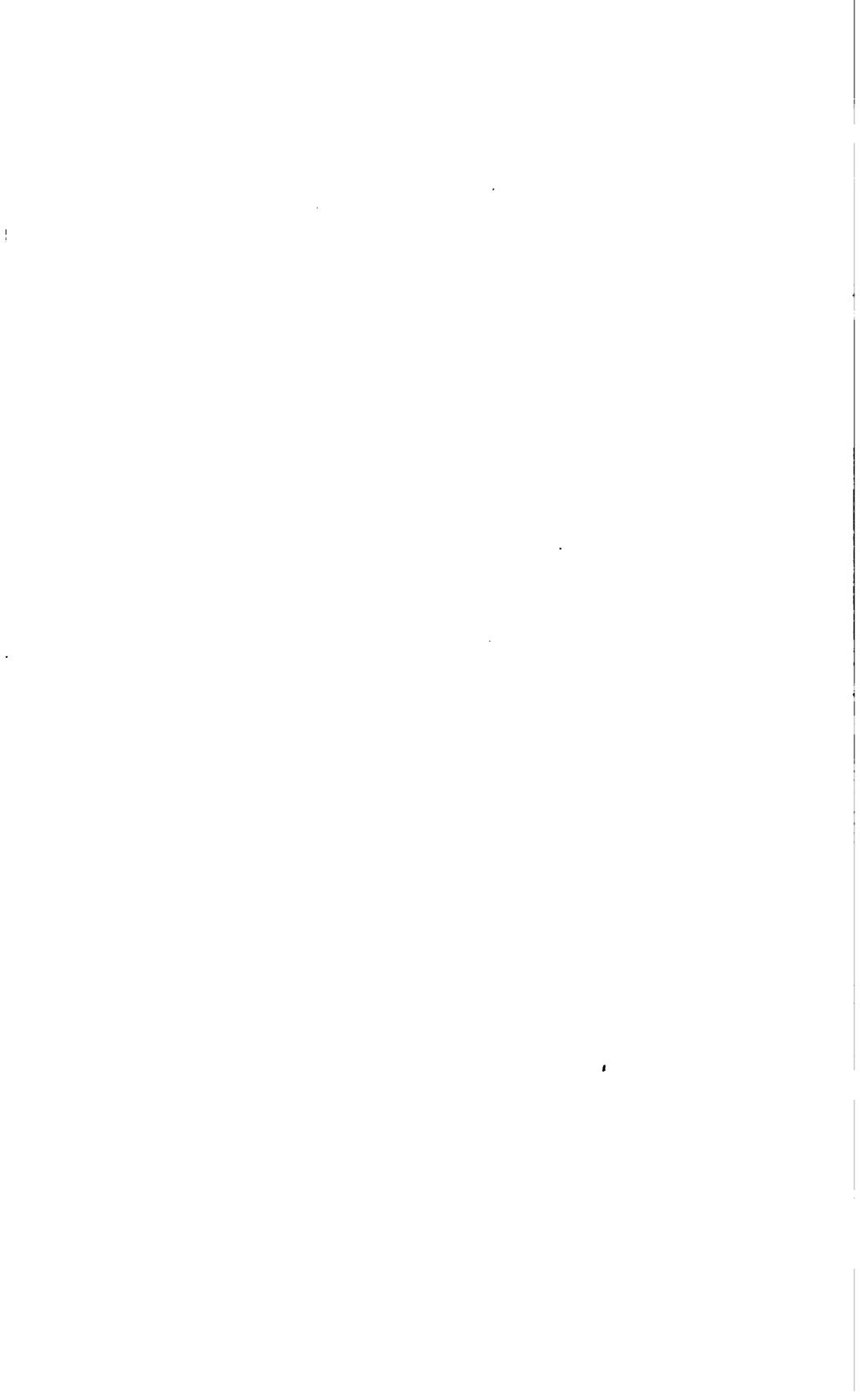
As to the manner in which the treaty was introduced, Pedley, the only witness upon that, represents it as proceeding entirely from the plaintiff; that the defendant, so far from holding out any inducement, rather hesitated to accept the offer. There is no pretence that the offer was in its own nature, such as necessarily discovers absence of judgment in the person making, or a degree of unfairness in those accepting it.

In this state of the evidence, I cannot possibly hold that the plaintiff was, by contrivance and management, drawn in to drink, or that any unfair advantage was taken of his intoxication to obtain an unreasonable bargain. As to the doubt appearing on the face of the paper whether, as it stands, it contains what was dictated to the plaintiff, read to him by Marshall, and afterwards by himself, the investigation of that point will be open at law upon the trial of any action founded upon this instrument, and can be much better made there than here. Here, indeed, that has not been examined; it was only adverted to in the course of the hearing. That the paper was not at first written as it now stands is quite apparent; and it will be rather difficult for the witnesses, professing to have given a full representation of the transaction, to account for their entire silence as to all that must have been said

or done before the paper was brought into its present state by the introduction of the first clause, and the consequential erasures and alterations. That, however, as I have said, will be for another tribunal, and in the view I have taken of the case I can do nothing but dismiss the bill without costs, and dissolve the injunction.

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	SUPPLEMENT.	
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SUPPLEMENT.

DURHAM v. DURHAM.

(L. R. 10 P. D. 80. Probate, Divorce, and Admiralty Division of the High Court of Justice, 1885.)

Contract of Marriage. — Insanity of Wife.

This was a petition by the Right Hon. the Earl of Durham, praying for a declaration of nullity of his marriage with Ethel Elizabeth Louisa, Countess of Durham (sued as Ethel Elizabeth Louisa Milner), by reason that at the time of the celebration of the ceremony she was of unsound mind and incapable of contracting marriage.

The respondent appeared by her brother, Edward Milner, and denied the insanity.

The parties were married on the 28th of October, 1882, at St. Peter's Church, Eaton Square, Pimlico, and it was admitted that the respondent was at the time of the hearing of the cause hopelessly insane. The other facts fully appear in the judgment.

Sir F. Herschell, S. G., Inderwick, Q. C., and Bayford, for the petitioner. The respondent's conduct was such before and immediately after the ceremony of marriage as to show that she never appreciated and realized the duties and obligations of a wife, and all the symptoms characteristic of her mental state before and immediately after the marriage render no other explanation possible than that of unsoundness of mind.

Sir H. James, A. G., Clarke, Q. C., and Pollard, for the respondent. The respondent not only knew the contract she was entering into, with its duties and obligations, but gave her consent to it. The Court views with extreme jealousy applications of this kind, and requires the strictest proof. Suits by reason of insanity are rare, and with the exception of Hunter v. Edney, a case like the present, i. e. where the suit has been brought,

not on behalf of the person whose insanity is in question, but by the other party to the contract, is without precedent: Turner v. Meyers, 1 Hagg. Con. 414; Portsmouth v. Portsmouth, 1 Hagg. Ecc. 355; Browning v. Reane, 2 Phillim. 69; Hancock v. Peaty, Law Rep. 1 P. & D. 335; Harrod v. Harrod, 1 K. & J. 4; Jenkin v. Morris, 14 Ch. D. 674; Wilkinson v. Wilkinson, 4 Notes of Cases, 295; Banks v. Goodfellow, Law Rep. 5 Q. B. 549.

Cur. adv. vult.

SIR J. HANNEN (President). The question I have to determine in this case is whether the respondent, at the time of the marriage on the 28th of October, 1882, was of sound mind, so as to be able to enter into the contract of matrimony.

All the authorities bearing on the subject have been brought to my notice, but I do not think it necessary to review them, as I am of opinion that every case of this kind must be decided upon its own facts. Nor do I consider that it would be useful to borrow from my predecessors, or to attempt myself to form any exact definition of what constitutes soundness of mind. I accept for the purposes of this case the definition which has been substantially agreed upon by the counsel to whom I have to express my obligations for the very able assistance they have given me, namely, a capacity to understand the nature of the contract, and the duties and responsibilities which it creates. It is to be observed, however, that this only conceals for a moment the difficulties of the inquiry, for I have still to determine the meaning to be attached to the word "understand." If I were to attempt to analyze this expression, I should encounter the same difficulties at some other stage of the investigation with reference to some other phrase, and I should still have to determine, on a review of the whole facts, whether the respondent came up to the standard of sanity which I must fix in my own mind, though I may not be able to express it. I may say this much in the outset, that it appears to me that the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend. It is an engagement between a man and woman to live together, and love one another as husband and wife, to the exclusion of all others. This is expanded in the promises of the marriage ceremony by words having reference to the natural relations which spring from that engagement, such as protection

on the part of the man, and submission on the part of the woman. I agree with the Solicitor-General, that a mere comprehension of the words of the promises exchanged is not sufficient. of one of the parties may be capable of understanding the language used, but may yet be affected by such delusions, or other symptoms of insanity, as may satisfy the tribunal that there was not a real appreciation of the engagement apparently entered into. It seems to me that the determination of the case must depend upon whether I come to the conclusion that there were such symptoms of insanity manifested by the respondent on the 28th of October, 1882. In considering this question, I think it cannot be regarded, as the Attorney-General contended, as though it had arisen on a will made by the respondent immediately after the wedding, speedily followed by the respondent's death. I am bound to take into consideration the fact that she has now become manifestly insane. I must look at the nature of that insanity, and form an opinion from the general history of the case, whether it is recent or sudden in its inception, or whether it has been of slow growth, and whether it had begun before the marriage, and had by that time reached a stage which incapacitated the respondent from entering into the contract of marriage.1

JESSON v. COLLINS.

(2 Salk. 437. Court of King's Bench, 1703.)

Contract of Marriage. — Verba de præsenti.

Mr. King moved for a prohibition to stay a suit in the Spiritual Court, upon a contract of marriage per verba de præsenti, suggesting that the contract was in fact per verba de futuro, for which, if not performed, the party had remedy at common law. Holf, C. J. said, that though it were per verba de futuro, yet it was a matrimonial matter, and the Spiritual Court had jurisdiction; and this was the great objection against actions at law, when first brought up in these cases; but in answer to this it was held that the remedy in the Spiritual Court was waived by

¹ The discussion of the evidence is omitted. — ED.

betaking himself to damages for the breach. Also he said, that a contract per verba de præsenti, was a marriage, viz. I marry You; You and I are man and wife; and this is not releasable: Per verba de futuro; I will marry you, I promise to marry you, etc., which do not intimate an actual marriage, but refer it to a future act; and this is releasable; and as it is releasable, the party may admit the breach and demand satisfaction. He also said, he remembered this case upon evidence; assumpsit, in consideration that the plaintiff promised to marry the defendant, the defendant promised to marry him; upon evidence, it was proved that there was a promise; yet the defendant producing a sentence in the Spiritual Court, in disaffirmance of that contract, it was held good counter-evidence, and the plaintiff was nonsuit. A prohibition was denied.

The report of this case under the name of COLLINS against JES-80T, in 6 Mod. 155, is as follows:—

HOLT, C. J. If a contract be per verba de præsenti, it amounts to an actual marriage, which the very parties themselves cannot dissolve by release or other mutual agreement; for it is as much a marriage in the sight of God as if it had been in facie ecclesiæ; with this difference, that if they cohabit before marriage in facie ecclesiæ, they are for that punishable by ecclesiastical censures; and if after such contract either of them lies with another, they will punish such offender as an adulterer. And if the contract be per verba de futuro, and after either of the parties so contracting, without a previous release or discharge of the contract, marry another, it will be a good cause with them of a dissolution of a second marriage, and of decreeing the first contract's being perfected into a marriage.

Quæ omnia tota Cur. concess. except the last point, whereof Powell, J. doubted.

Upon which Holt, C. J. added, that it was first resolved in my Lord Vaughan's time, that an action would well lie at common law for breach of such an executory contract per verba de futuro; which resolution Vaughan totis viribus opposed, because the party had this remedy in the Spiritual Court, which was agreed by all. But notwithstanding, it was resolved that the party had his election of either remedy, and that by bringing an action at common law, and that appearing on record, the remedy in the Spiritual

Court was actually released; for now, in lieu of a performance of the contract, he shall recover damages. And he quoted a case which he remembered had been tried at Guildhall, which was an action for breach of such a promise, and, upon issue of non assumpsit, proof was made of the promise; but the defendant showing that he had been sued for the same matter in the Spiritual Court, and producing a sentence against the plaintiff, the plaintiff, notwithstanding this proof, was nonsuited, because that they were the proper judges in the Spiritual Court whether it were a pre-contract or not. And if a man and woman make mutual promises of intermarriage in futuro, and the man give the woman a hundred pounds in satisfaction of the promise, and she accepts it so, it is a good discharge of the contract.

And being stirred again at another day: —

Per Curiam. The Spiritual Courts have jurisdiction of all matrimonial causes whatsoever; and where it appears to us that the cause is spiritual, of which in consequence they have conusance, unless it be by reason of some collateral temporal matter in it, we ought not to prohibit them. And it is no reason here to prohibit them because this may be a future contract, for breach of which an action at law will lie, no more than when they libel for laying violent hands upon a spiritual man, for which an action at law lies for him for the battery, and a suit in the Spiritual Court for the irreverence to his character.

FENTON v. REED.

(4 Johns. 52. Supreme Court of New York, 1809.)

Contract of Marriage. — Cohabitation.

This case came before the Court on a certiorari from the Justices' Court in New York.

It appeared, upon the trial below, that Reed, the plaintiff below, demanded a certain annual payment of 25 dollars, secured by the constitution of the Provident Society, to the widows of deceased members of that society. William Reed, whose widow the plaintiff below claimed to be, was a regular member of the society, at

the time of his decease. By the constitution of the society, the widows of regular members were entitled to 25 dollars, annually, from the funds thereof. The only point in controversy was, whether the plaintiff was the widow of Reed. In the year 1785, she was the lawful wife of John Guest. Some time in that year, Guest left the State for foreign parts, and continued absent until some time in the year 1792, and it was reported, and generally believed, that he had died in foreign parts. The plaintiff, in 1792, married Reed. In that year, and subsequent to the marriage, Guest returned to this State, and continued to reside therein until June, 1800, when he died. He did not object to the connection between the plaintiff and Reed, and said that he had no claim upon her, and never interfered to disturb the harmony between them. After the death of Guest, the plaintiff continued to cohabit with Reed until his death, in September, 1806, and sustained a good reputation in society; but no solemnization of marriage was proved to have taken place between the plaintiff and Reed, subsequent to the death of Guest.

Upon these facts, the Court below decided, that the marriage with Reed was not meretricious or void, and that the plaintiff was entitled to the annuity.

The plaintiff in error contended, that the statute concerning bigamy only purged the felony, and did not legalize the marriage with Reed, which, after the return of Guest, was meretricious; that though the subsequent cohabitation with Reed, as his wife, after Guest's death, was sufficient to charge him with her debts, as her husband; yet that, when the wife comes and claims a right, quasi wife or widow, she must prove a marriage in fact, and that the continuance of cohabitation was not sufficient.

The defendant in error insisted, that the statute concerning bigamy frees her from guilt, and that her subsequent cohabitation with Reed was not meretricious.

On the facts and the points above stated, the case was submitted to the Court, without argument.

Per Curiam. The marriage of the plaintiff below with William Reed during the lifetime of her husband, John Guest, was null and void. It was of no legal avail whatever, and not sufficient to constitute them husband and wife de facto. This has been the uniform and well-settled rule of the common

law. (1 Roll. Abr. 340, pl. 2, 357, pl. 40, 360, F; Cro. Eliz. 858; 1 Salk. 120.) The statute concerning bigamy does not render the second marriage legal, notwithstanding the former husband or wife may have been absent above five years, and not heard of. It only declares that the party who marries again, in consequence of such absence of the former partner, shall be exempted from the operation of the statute, and leaves the question on the validity of the second marriage just where Elizabeth Reed was then the lawful wife of Guest, and continued so until his death, in 1800; and the true question is, whether there was evidence sufficient to justify the Court below in concluding that she was afterwards married to Reed. Though the Court below may have decided upon erroneous grounds, yet if upon the return there appear to be other and sufficient reasons to justify their decision, the judgment ought to be affirmed. It is stated, that there was not proof of any subsequent marriage in fact, and that no solemnization of marriage was shown to have taken place. But proof of an actual marriage was not necessary. Such strict proof is only required in prosecutions for bigamy, and in actions for criminal conversation. (4 Burr. 2057; Doug. 171.) A marriage may be proved in other cases, from cohabitation, reputation, acknowledgment of the parties, reception in the family, and other circumstances from which a marriage may be inferred. (4 Burr. 2057; 1 Esp. Cases, 213; 2 Bl. Rep. 877; Peake's Cases, N. P. 231.) No formal solemnization of marriage was requisite. A contract of marriage made per verba de præsenti amounts to an actual marriage, and is as valid as if made in facie ecclesiæ. (6 Mod. 155; 2 Salk. 437; Peake's Cases, 231.) In the present case, there existed strong circumstances, from which a marriage subsequent to the death of Guest might be presumed. The parties cohabited together as husband and wife, and under the reputation and understanding that they were such, from 1800 to 1806, when Reed died; and the wife, during this time, sustained a good character in society. A jury would have been warranted, under the circumstances of this case, to have inferred an actual marriage, and the Court below had sufficient ground to draw that conclusion; and as they have drawn it, and their decision being a substitute for a verdict, we will not disturb it.

Judgment affirmed.

HANTZ against SEALY.

(6 Binney, 405. Supreme Court of Pennsylvania, 1814.)

Contract of Marriage. — Verba de Præsenti. — Cohabitation.

This was an action of assumpsit in the Common Pleas of York county, brought to August term, 1807, by Mary Sealy, the plaintiff below, to recover the amount of the personal estate of Henry Sealy, her late husband, bequeathed to her by his will. The Narr. contained also a count for money had and received. The defendant pleaded: 1. Non assumpsit; 2. Payment; 3. That the plaintiff was his wife.¹

Upon the third, it was proved that a marriage took place between the plaintiff and defendant before a clergyman in the month of January, 1799; that he and she had given receipts by the name of Jacob and Mary Hantz; that they cohabited as man and wife, had children, and had executed deeds for land, in which she was styled his wife, and had acknowledged them as such. At the time of this marriage it was, however, perfectly clear that the defendant had another wife living, from whom he had been separated, according to his own notion effectually, but without any effect whatever in law. A legal divorce was afterwards obtained, and Hantz and Mrs. Sealy, having come to Mr. Watts, their counsel, on business, he advised them to celebrate a new marriage. Hantz then said, "I take you (the plaintiff) for my wife;" and the plaintiff being told that, if she would say the same, it would be a complete marriage, she replied, "To be sure he is my husband good enough." Mr. Watts advised them to repeat the marriage in a solemn manner before a clergyman, and he thought they went out for that purpose; but it was never done.

The matters objected by the defendant were: 1. The marriage, which was said to be proved both by the ceremony before Mr. Watts, and by the cohabitation and acts of the parties. 2. That no express promise having been proved, the action of assumpsit would not lie upon an implied promise until after a settlement of the administrator's account, and an order of distribution by

¹ Report and opinions as to the first two issues are omitted. — ED.

the Orphans' Court. 8. That if a promise might be implied before, at all events it could not be until it was the defendant's duty to pay, in other words, until the will was established; of course the action was premature. 4. That the greater part of the property being in bonds and notes, the plaintiff could not recover the amount of these in an action for money had and received, because she had not proved their conversion into money. 5. That no refunding bond had been filed before the suit was brought.

The President charged the jury: 1. That as to the cohabitation and acts of the parties, they did not amount to a marriage, but were facts from which a marriage might be inferred. They were circumstances on which to ground a presumption of marriage, and might be met by circumstances showing that they were founded on some fact unconnected with marriage. As, for instance, if the cohabitation was merely the consequence of the marriage before the clergyman, which was clearly void, and if the acknowledgments referred entirely to the fact of that marriage, then they could not be considered as referring to any other marriage, nor have any weight in proving the marriage contended for. These facts would entirely destroy the presumption of a legal marriage, that would otherwise arise from the cohabitation and acknowledgments; and the jury were to decide upon them. As to the marriage before Mr. Watts, there was no doubt that marriage in Pennsylvania was so far a civil contract as to be governed by the municipal laws of the State, viz. the statute and common law, without the intervention of any spiritual or ecclesiastical law, as in England. There was no particular form of ceremony established by the law of Pennsylvania which was to govern in all cases.; but marriage was a very important and solemn institution, and the manner in which it was to be contracted ought to be suitable to the nature and importance of the engagement. It was not absolutely necessary to be done before a clergyman or a magistrate; but it ought to be entered into with consideration and deliberate assent, and ought to be done formally and solemnly. The Court did not think it necessary to lay down any rule as to what form and ceremonies might be requisite to form a marriage; but they were decidedly of opinion, that the facts which occurred before Mr. Watts did not constitute a legal marriage. where assets were in the hands of an executor, the law would imply a promise before a settlement of accounts and an order of disdecided by a majority of the Court, in receiving it as evidence 4. That the jury should be satisfied that the amount claimed had been received by the defendant before the commencement of the suit; but that the jury might presume this as well as any other fact from the evidence. Direct proof was not necessary. 5. That the want of a refunding bond should have been objected on the return of process, or in a plea in abatement, and that it was now too late.

To this charge an exception was taken, and all the points that were urged below were now argued in this Court, by *Montgomery* and *Duncan*, for the plaintiff in error, and by *Bowie* and *Hopkins*, for the defendant in error.

TILGHMAN, C. J. In the assignment of errors, several exceptions are taken to the charge delivered by the President of the Court of Common Pleas, of which it is necessary to take notice; but the main ground of defence is, that the plaintiffs could not support an action until the validity of the will was finally decided.

The defendant pleaded that he was married to the plaintiff, on which issue was joined, and it was objected that the judge ought to have directed the jury that the evidence proved the marriage. The judge laid down the law correctly. He told the jury, that marriage was a civil contract, which might be completed by any words in the present time without regard to form. He told them also, that in his opinion the words proved did not constitute a marriage, and in this I agree with him. The plaintiff and defendant came to their lawyer, Mr. Watts, on business, without any intention of marrying. They had long lived in an adulterous intercourse, although they considered themselves as lawfully mar-In fact, they had entered into a marriage contract which was void, because the defendant had a former wife living, from whom he had been separated by consent, but not legally. Some time before the parties came to Mr. Watts a legal divorce had been pronounced, and Mr. Watts advised them to celebrate a new The defendant said, "I take you (the plaintiff) for my wife," and the plaintiff being told that, if she would say the same thing, the marriage would be complete, answered, "To be sure he is my husband good enough." Now these words of the woman do not constitute a present contract, but allude to the past contract, which she always asserted to be a lawful marriage. Mr.

Watts advised them to repeat the marriage in a solemn manner before a clergyman, which was never done. So that, under all circumstances, it appears to me that what was done was too slight and too equivocal to establish a marriage.

STARR v. PECK.

(1 Hill, 270. Supreme Court of New York, 1841.)

Contract of Marriage. — Verba de Futuro. — Cohabitation.

EJECTMENT, tried at the Albany Circuit, October 15th, 1840, before Cushman, C. Judge. The land in question was formerly owned by Samuel Starr, deceased. The plaintiffs claimed as the children and heirs at law of Chauncey Starr, deceased, a son of said Samuel. They and the defendant were the only persons entitled to the land. It was admitted by the defendant that the plaintiffs were entitled to one half. The defendant owned the right of Abby Peck, deceased, a daughter of said Samuel by Sarah Barnes, to whom he (Samuel) was married, and who was also the mother of Chauncey Starr, the plaintiffs' father; but the defendant's claim was controverted, on the ground that said Abby was illegitimate, having been born, as alleged, before said Samuel and Sarah were married.

At the trial, it appeared that the said Samuel and Sarah were formally married by a clergyman at Middletown, Connecticut, more than fifty years ago. Both were dead, having cohabited as husband and wife for many years, and until their separation by death. Their children were the said Abby and Chauncey. Abby was born ten days before the marriage ceremony. Samuel had visited said Sarah in the way of courtship, for about a year previous to the marriage. He followed the sea; and was at sea when Abby was born. Sarah had given out that they were engaged, before he went to sea; and they were married, as mentioned, in a week after his return, — he having been detained longer than was expected when he left. Abby lived with them till her marriage, and was always afterwards received and treated by both as their legitimate child.

The judge left it to the jury, whether there had not been a marriage in fact before the ceremony, and before said Samuel was last at sea. To this the plaintiffs' counsel objected, insisting, among other things, that there was no evidence from which the jury could find that a legal marriage had taken place before the birth of said Abby. The jury found a verdict in favor of the defendant, and the plaintiffs now move for a new trial on a case.

D. Burwell, for plaintiffs.

M. T. Reynolds, for defendant.

By the Court, Cowen, J. The single question for the jury was, whether Abby, the person under whom the defendant claims, was a legitimate child. They found that she was; and it is now insisted, that the verdict was against the weight of evidence. She was born some week or ten days before the marriage ceremony, and while her father was at sea; and there is no direct evidence of any marriage, nor perhaps of any engagement to marry, before that time; though there can be little doubt that the parties had at least agreed to be married, and the ceremony was delayed till after Abby's birth, in consequence of the proposed husband's accidental detention on his voyage.

But it is true that the parties had power to contract marriage inter se, before the husband went to sea, without the intervention of a clergyman. (Fenton v. Reed, 4 Johns. 52.) Such is the common law, which we must presume was the law of Connecticut at the time, in the absence of proof to the contrary. And it is insisted that the circumstances were sufficiently strong in favor of such a marriage to warrant the jury in finding that it took place. The public celebration or ceremony is sought to be explained by saying, that it might very properly have been required for the satisfaction of the parties, the family, and the public; and the long time during which Abby was received and treated as a legitimate child in her father's family is insisted on as a positive circumstance. To this may be added, the presumption that the parties would not indulge in a connection which was immoral, not to say criminal, especially when they might themselves alone have rendered it innocent by a marriage contract per verba de præsenti. We are to presume against a notorious act of immorality almost as strongly as we would against the commission of a legal crime. (Vid. Cusack v. White, 2 Rep. Const. Ct. So. Car. 282.) A woman married in a little more than

twelve months after her husband went abroad; he was not afterwards heard of; and the wife continued to cohabit with her second husband. It was presumed, in favor of the legitimacy of their children, that her first husband was dead at the time of her marriage with the second. (Rex v. Twyning, 2 Barn. & Ald. 386.) In Emmett v. Norton, 8 Carr. & Payne, 506, Lord Abin-GER, C. B., told the jury, that, though the husband and wife lived in a state of separation, they were not to presume that it was for adultery, or because the husband had turned her out of doors; but rather some innocent cause, e.g. a difference of temper. Where a bailee loses goods, negligence is not to be presumed, but must be proved. (Brind v. Dale, id. 207.) Various other cases might be mentioned, wherein the law presumes against the slightest violations of duty in the business and other relations of private life. (Vid. Sill v. Thomas, id. 762, and Hanck v. Hooper, 7 id. 81.) Honesty, not fraud, is to be presumed. Thus, the law presumes not only against immorality, but even the venial offence of negligence, or breach of private duty. The principle was applied to the case of a marriage de facto, in Fenton v. Reed. There, a woman's marriage was publicly solemnized with another man, while her first husband was alive. She continuing after his death to cohabit with the other, a marriage de facto was held to be presumable by the jury. The presumption in that case, too, was allowed in favor of a right personal to the woman herself; a fortiori should it be allowed in favor of the legitimacy of her children. The only difference between the case cited and the one at bar is, that there the parties publicly cohabited after the solemnization; while here, they secretly cohabited before. In both, there was a subsequent and perfectly amicable cohabitation during the lives of the parties. In either case, it must be admitted that, from appearances, it was open to infer a reliance by the parties on their public marriage alone; and that they had never contracted a private one, nor ever thought of doing so. In the reported case, however, I think the inference quite as strongly warranted as in this; and yet it was allowed to be overcome by adverse circumstances of no greater strength. Secret cohabitation, pregnancy, and birth, followed by immediate solemnization and public cohabitation for life, would seem to furnish considerable evidence that the parties had agreed, before that connection which resulted in pregnancy, to consider themselves as

married in fact. The case bears no feature of heartless prostitution. The proofs are plain, that the object of both parties was marriage; and it seems not at all extravagant to presume, in favor of the female at least, that before submitting to a connection which she must otherwise have considered criminal in the highest degree, she would have required such a form of contract as to change its character. Nothing appears in the case leading one to suppose that her husband would have hesitated in making such a contract; and that it was not publicly acknowledged and solemnized before the birth of the child may be set down as the result of his accidental detention at sea, for a considerably longer time than the regular course of his voyage required. No peculiar form of words is necessary to such a con-In Morton v. Fenn, 3 Doug. 211, it appeared that the defendant promised to marry the plaintiff if she would go to bed with him that night, which she did, and lived afterwards with him a considerable time. Lord Mansfield 1-marked that, before the marriage act, this would have been a good marriage, and the children legitimate, by the rules of the common law. (Holt, C. J., in Wigmore's case, 2 Salk. 438, S. P.; Dumaresly v. Fishly, 3 Marsh. (Ken.) Rep. 372, S. P.) Thus, a contract in words merely executory, followed by the act of the parties in lying together on the faith of such contract, is equivalent to words of present import. The circumstances are to be taken as giving a construction to the words, and rendering them presently operative. (3 Marsh., ut supra.) The evidence in the case at bar may, I think, be considered quite strong that Abby's parents had, before her birth, made a contract of marriage, either per verba de præsenti, or futuro; and whether in one form or the other, the consummation which resulted in her birth, according to the cases cited, rendered the marriage complete.

It seems to us, therefore, that the learned judge was right in submitting the question of a marriage in fact to the jury.

Bronson, J. dissented.

New trial denied.

CHENEY v. ARNOLD.

(15 N. Y. 345. Court of Appeals of New York, 1857.)

Contract of Marriage. — Verba de Futuro and Cohabitation.

Denio, C. J. The plaintiff, Phila Cheney, claims to be the daughter of Charles Harris, who is admitted to have been seized of the premises claimed in this action, and she seeks to recover as his heir. The defendant claims under a conveyance from her mother, Betsey Pike, formerly Betsey Harris; and he insists that the plaintiff is not the legitimate daughter of Charles Harris, and cannot therefore inherit from him, though it is not denied that she is his natural daughter.

Upon the question of the plaintiff's legitimacy, there was no room for controversy about the facts. It was proved by the plaintiff's own witness, Betsey Pike, that when her daughter, the plaintiff, was born, she had not been married to Charles Harris, the plaintiff's father. She swore, however, that there was a mutual engagement between them to be married to each other at some future time, and that after such engagement the plaintiff was begotten, and that their marriage was actually celebrated a few months after the plaintiff's birth. There was no cohabitation between them as husband and wife; they did not hold themselves out, and they were not recognized by their relatives or acquaintances, as married persons until the formal marriage. tiff was, however, brought up by them, and always recognized as their daughter. The plaintiff's counsel maintains that mutual promises to marry, followed by carnal intercourse, is a legal marriage, and that the judge consequently committed an error in submitting the question to the jury whether the engagement was that they would presently take each other as husband and wife, or whether it was executory in its character; as he maintains that in either case they became husband and wife from the time the intercourse commenced. I agree that there was nothing to be left to the jury, for there was no disputed question of fact. There was no agreement between the parties to become husband and wife in præsenti, but there was an agreement to be married in

futuro, and that was followed by carnal intercourse; and if that constitutes a marriage by our law, they were married, and the plaintiff is legitimate; otherwise she is not.

There is a dictum by Judge Cowen, in Starr v. Peck, 1 Hill, 345, which fully sustains the plaintiff's position; but it was unnecessary to the decision. It was a case in which the jury were left to presume a marriage in fact, by which I understand a present contract, from the conduct of the parties; and the verdict affirmed the existence of a marriage. There was no evidence of a contract, present or future, and it was as easy for the jury to find the one as the other. What was said by the learned judge as to a contract per verba de futuro was obiter. Chancellor Kent also countenances the position of the plaintiff's counsel. He says: "If the contract be made per verba de præsenti and remains without cohabitation, or if made per verba de futuro and be followed by consummation, it amounts to a valid marriage in the absence of all civil regulations to the contrary." (2 Com. 86, 2d ed.) BLACKSTONE too says that, in cases of cohabitation, contracts per verba de futuro were, before the marriage act, deemed valid marriages for many purposes, and the parties might be compelled in the spiritual courts to celebrate them in facie ecclesiæ. Notwithstanding these respectable opinions, I have not been able to assent to the proposition. With us marriage is simply a civil contract, differing, it is true, from contracts upon other subjects in the circumstance that it is not in the power of the parties to release or dissolve it, but partaking in many other particulars of the nature of common law contracts. It requires the existence of two parties, of different sexes, competent to contract, and an actual contract between them. Like other contracts, it may be in terms and intent executory or executed. If executed, that is, if the parties agree eo instanti to take each other for husband and wife, it is ipsum matrimonium. If executory in its terms, it would not, by any analogy to common law contracts, create the relation of husband and wife. It would bind the parties to enter into these relations in future, and, viewed as an agreement to marry, it confessedly does furnish the basis of an action for damages. were like some other common law contracts, an action in the nature of a bill in equity might be sustained to enforce a specific performance. But the temporal courts in England never possessed a jurisdiction to enforce matrimonial contracts specifically,

and we have no tribunals corresponding with the English ecclesiastical courts, which did formerly exercise such a jurisdiction. (Burtis v. Burtis, Hopk. 557.) Our courts have all the jurisdiction of the English common law and equity courts which has not been denied them by the legislature, and such other jurisdiction as has been conferred upon them by statute. But as these English common law courts never had any authority to decree a marriage upon the ground of an executory contract to marry, and we have no statute creating such a jurisdiction, it follows that, if parties agree to marry and one of them refuse to perform the agreement, no power exists in our courts to compel a performance. So far, then, as the analogies between agreements to marry and other executory contracts carry us, the only effect of the former is to lay the foundation for an action for damages in case of a breach. Carnal intercourse without marriage does not create any legal relation between the parties, or confer any rights upon the issue of such connection.

If by the law of England, as it existed at the Revolution and as it was then administered in the temporal courts, an agreement to marry, followed by intercourse, constituted marriage, then, as we have adopted that system, and no change in that particular has been made by statute, we must hold that the plaintiff's parents were married before she was born, and that she is legitimate. It is clear that such a doctrine existed in the canon law; and that system, with some modifications, was, in a general sense, the basis of the matrimonial law of the nations of Europe, England included. (Dalrymple v. Dalrymple, 2 Hagg. 54.) It was the law of the church and was administered in the spiritual courts. Marriage contracts, whether by words in the present tense or per verba de futuro, which were followed by consummation, were not considered perfect marriages, but the spiritual courts had a jurisdiction to compel their due celebration in facie ecclesia. mean time a certain effect was given to them before celebration. The parties were for some, and perhaps for most, purposes considered as husband and wife. The present question is, how far the law of England regarded such irregular marriages as sufficient to predicate legitimacy of the offspring. Sir William Scott (afterwards Lord Stowell), in his masterly judgment in Dalrymple v. Dalrymple, after stating the doctrines of the canon law to the effect above mentioned, adds that "the common law

certainly had scruples in applying the civil rights of dower and community of goods and legitimacy in the cases of these looser species of marriage." The English marriage act of 26 George II., ch. 33, passed in 1753, as is well known, required marriages to be celebrated in a parish church by banns, or by license, and declared all other marriages, with certain exceptions, to be void. It never applied to the colonies, and had no force here. It abolished in express terms the jurisdiction of the spiritual courts to compel the celebration of a marriage by reason of any contract of matrimony whatever (§ 13). It is extremely difficult to ascertain what the English matrimonial law was, prior to the statute, and what it now is in cases to which the statute does not extend. Upon the question whether contracts by present words or by agreement looking to the future for its performance, with carnal intercourse but without a formal celebration, amounted to a legal marriage, the cases are numerous and conflicting. Some of them, containing dicta which would seem to support the proposition contended for by the plaintiff's counsel, are referred to by Judge Cowen. The question has been examined with industry and care by Mr. Jacob in his Addenda to Roper's Treatise on Husband and Wife (Roper, 445). He has collected, with great discrimination, all the judgments and dicta, together with the conclusions of the text writers and the various statutes on the subject passed prior to the act of George II., and he comes to the confident conclusion that such contracts as we are considering "did not confer on the woman the right to dower, on the man the right to the woman's property, or on the issue the right of legitimacy, and that it did not render a subsequent marriage with a third person ipso facto void at law, though it formed a ground for sentence (in the spiritual courts) annulling it. The authorities," he adds, " seem to show that, according to the ecclesiastical law, the contract did not give any right except to call for a performance of it by actual solemnization, not justifying cohabitation or conferring conjugal rights; and that at the common law it had no effect, though in cases where the parties cohabited and were reputed to be man and wife this might afford sufficient evidence for the purpose of some actions in which strict proof was Among the authorities referred to, to sustain this not required." opinion, is the speech of Lord Mansfield, then Solicitor-General, on introducing the marriage act into Parliament. He is reported

to have said: "I believe it will be allowed, if a man and woman seriously and sincerely enter into a marriage contract without the interposition of a clergyman or any religious ceremony whatever, it will be a good marriage both by the law of God and the law of nature; yet the law of this society, and I believe of every other Christian society, has declared it not to be a good marriage." Without further comment on the authorities upon which this writer relies, which have, however, been attentively examined, I am prepared to adopt his conclusion as to the state of the law of England prior to the marriage act. It follows that the doctrine of the canon law, that a contract of marriage per verba de futuro, followed by carnal intercourse, was a valid marriage, did not become the law of this State by force of our adoption of the common law of England, for it was not a part of that common law. Should it be said that this course of reasoning would repudiate marriages per verba de præsenti without solemnization, I answer that the validity of such marriages is firmly established by judicial decisions in this State which we are not at this day at liberty to question; (Newton v. Reed, 4 Johns. 52; Jackson v. Clow, 18 id. 346; Jackson v. Winne, 7 Wend. 47; Rose v. Clark, 8 Paige, 574; In the Matter of Taylor, 9 id. 611; Clayton v. Wardell, 4 Comst. 230;) but there is no judicial authority with us in favor of inferring a marriage from an executory agreement followed by intercourse, except the dictum in Starr v. Peck, to which I have referred. But I think the validity of marriages by words of present contract can be shown independently of those cases. Marriage, so far as personal rights and the rights of property were concerned, has always been a civil contract, requiring only the present assent of parties competent to contract, and such ceremonial observances as the positive municipal law had prescribed. At the Reformation the ritual of the reformed Church of England, established by act of Parliament, prescribed the form of the marriage ceremony, which was to be celebrated, through the ministry of the priest, in facie ecclesiæ. There was at the same time an ecclesiastical judicature, with jurisdiction over questions of marriage and divorce. In adopting the common law purely, the prescriptions of the prayer-book and the laws concerning the ecclesiastical judicature disappeared from the system. We inherited simply the principle which declared marriage to be a civil contract. The common law itself supplied us with

all necessary rules for determining the requisites for entering into the contract, and moreover prescribed the legal relations established by and the legal consequences which followed a valid marriage. The principle that a promise, followed by intercourse, was in some sense a marriage, was a branch of the ecclesiastical system resulting from the acknowledged jurisdiction of the ecclesiastical courts to compel the performance of such marriages by spiritual censures. Having dispensed with that jurisdiction, we cannot consistently acknowledge any marriage to be valid which requires the intervention of a spiritual court to make it perfect. We must insist upon those circumstances which the law requires in an executed contract upon any other subject. Mutual promises to marry in future are executory, and, whatever indiscretions the parties may commit after making such promises, they do not become husband and wife until they have actually given themselves to each other in that relation. That this has been the sense of the legal profession and of the courts is evident from the rules relating to several actions in common use. If a man seduce a woman under a promise of marriage, we allow an action for the seduction at the suit of the father, and an action for a breach of the promise at the suit of the daughter. (Foster v. Scoffield, 1 Johns. 297; Gillet v. Mead, 7 Wend. 193; Brownell v. McEwen, 5 Denio, 367.) According to the plaintiff's argument both actions would be absurdities; for, the marriage being complete by the act complained of, there would be no seduction and no breach of promise. So in the action for a breach of a promise of marriage, if it appear that the plaintiff, on the faith of the defendant's promise, has been seduced by him and has become enceinte, it is considered as a circumstance of great aggravation, and the damages are proportionably increased; whereas, if the plaintiff's position is sound, the defendant by the very act has made all the reparation in his power and has become the husband of the plaintiff. The legislature, moreover, has not understood the law as the plaintiff does. By an act passed in 1848 (Sessions Laws, ch. 111) the seducing and having illicit conversation with an unmarried female under promise of marriage is made a misdemeanor punishable by imprisonment; but the offence may be absolved by a subsequent marriage. The legislature intended by this enactment to protect female purity, and not to deprive a wife of her lawful husband.

The foregoing considerations have satisfied me that the plaintiff's doctrine is not the law of this State. No evidence was produced respecting the matrimonial law of Rhode Island. In the absence of such evidence, we are to intend that it is the same as our law.

It follows from what has been said that the plaintiff is not the legitimate child of Charles Harris. She cannot consequently recover as his heir. When she had shown the facts respecting her legitimacy, the judge should have decided the case upon the question of law, and have directed a verdict for the defendant. She cannot complain of directions which gave her a chance for a verdict to which she was not entitled.

The judgment should be affirmed.

Bowen, J., also delivered an opinion for affirmance, and all the judges who had heard the argument concurred.

Judgment affirmed.

VALLEAU v. VALLEAU.

(6 Paige, 207. Court of Chancery of New York, 1836.)

Contract of Marriage. — Absence of Husband for more than Five Years. —
Second Marriage.

THE CHANCELLOR [WALWORTH]. I do not think the complainant's evidence makes out a case which entitles him to a divorce on the ground of adultery, under the provisions of the revised statutes. The testimony shows that but a few months after his marriage, and apparently without any reasonable cause or excuse whatever, the complainant abandoned his wife, and has voluntarily absented himself from her for more than fourteen years, a considerable portion of which time he was out of the State and out of the country. And there is no allegation or proof whatever to show that at the time of her second marriage, or at any time afterwards before the death of Morin, she knew or had any reason to suppose her first husband was living. As it would have been a felony for the defendant to have contracted the second marriage if she had known that her first husband was then living, although he had absented himself for more than five years, this Court can-

not, in the absence of all proof on the subject, presume that she has been guilty of such an offence. If the second marriage took place since the adoption of the revised statutes, it is therefore impossible for this Court to decree a divorce for adultery on account of her cohabitation with Morin, the second husband, until the fact is satisfactorily established that she knew the complainant was living within the term of five years before her second marriage; and the master reports that it is not proved that she knew the complainant was living within such term of five years. The legislature has declared that a second marriage contracted in good faith, where the first husband or wife had absented himself or herself for the space of five successive years, without being known to the other party to be living during that period, is voidable merely; and shall only be considered as void from the time when its nullity shall be decreed by a court of competent authority. (2 R. S. 139, § 6.) Where the second marriage, therefore, is contracted in good faith, under such circumstances, although it may be adultery in foro conscientiæ for the parties thereto to continue to cohabit together after they shall have ascertained that the first husband or wife is still living, it is not such a criminal adultery as will authorize the rightful husband or wife to file a bill for a divorce, under the laws of this State. The last marriage being voidable merely, and the children of such marriage being declared legitimate for certain purposes, it would be both illegal and improper for one of the parties thereto to attempt to cohabit with the first husband or wife before the last marriage was judicially annulled. And as a cohabitation with the last one could not conscientiously be continued, inasmuch as it would be inconsistent with the requirements of the Divine law, it might, as a matter of conscience merely, be improper to cohabit with either until the last marriage was decreed to be void. The remedy of the former husband or wife, in such a case, is to file a bill, and proceed in the manner prescribed by the statute, to annul the voidable marriage; and if the parties thereto continue to cohabit together after a decree of nullity has been pronounced, the rightful husband or wife may then file a bill for a divorce on the ground of that adul-If it should be deemed a hardship that a party should be compelled to sue for a dissolution of the second marriage, and to take back a husband or wife who had been thus married to another, it must be recollected that such cases will very seldom occur, except where the party complaining has himself been guilty of a breach of the marriage contract, by a wilful abandonment of his or her companion for a length of time which, by the laws of most countries, would entitle the other party to a divorce. And if he or she has faithfully kept the marriage vow in other respects for so long a time, it may be no particular hardship to be compelled to keep it in the same manner until the second marriage is annulled, or the bond of the first is dissolved by the death of one of the parties. If, on the contrary, the party complaining has been guilty of adultery during such abandonment, that of itself is a perfect answer to the complaint against the party who has been thus improperly abandoned.

In the present case, if the second marriage took place previous to 1830, — and from the testimony I am inclined to think it did, as there were two children by that marriage previous to the death of Morin in 1832, — it would not come within this provision of the revised statutes rendering the marriage valid for certain purposes until it was legally annulled. That, however, would not vary the case so far as to entitle the complainant to a decree for a divorce, as it would then come within the principle of the decision of this Court in the case of Williamson v. Williamson, 1 Johns. Ch. Rep. 486, which principle is now incorporated into the revised statutes, requiring the suit to be commenced within five years. I presume the complainant in this case has proceeded upon the supposition that the adultery continued down to the death of Morin, and that it was sufficient if the bill was filed within five years from that time. If the case depended upon the question as to what time the last act of adultery with Morin was committed, the Court could hardly be called upon to presume that it continued up to the very day of his death, and that he died within the five years. It would therefore be proper, in that view of the case, to refer it back to the master to ascertain whether Morin died in 1831 or 1832, and at what time in the year, as neither of the witnesses speak with any certainty even as to the year of his death. And it would also be necessary for the master to make more particular inquiries as to his situation and bodily capacity for some time previous to that event. The decision of this Court, however, in the case of Williamson v. Williamson did not proceed upon any such ground, as the defendant in that case had continued to cohabit with the husband of the second marriage down to the very time of the filing of

the complainant's bill. But that case went upon the ground that the defendant had contracted a second marriage during the complainant's absence in the West Indies, and had from the time of such marriage continued to reside and cohabit with Parisien as her husband; and that the complainant after his return had acquiesced therein by neglecting to commence his suit for more than five years; which, according to the principles of the civil law, was a sufficient acquiescence in the continued adultery of the defendant to bar a suit for a divorce, by the lapse of time. The revisers, in their report to the legislature, refer to this decision as containing the principles which they had introduced into the revised statutes on this subject. In conformity with that decision, therefore, I must declare the true construction of the third subdivision of the forty-second section of the article of the revised statutes relative to divorces dissolving the marriage contract to be, that if the complainant knows that his wife has contracted a second marriage and continues openly to cohabit with such second husband, or that she is living in open and continued adultery with another person even without the usual form of a marriage, the right to file a bill for a divorce for such adultery will be barred after the expiration of five years, although such cohabitation or adulterous intercourse is continued down to the time of the commencement of the suit. And where such continued adultery is open and notorious, the complainant must also satisfy the court that, by reason of his absence from the country or otherwise, he was not aware of the fact of such continued cohabitation and adultery until within five years from the time of the commencement of the suit.

In the present case the complainant has wholly failed in satisfying me that he was ignorant of the marriage and continued co-habitation of his wife with Morin until within five years. It appears that he returned to this State as early as 1827, and has resided at Buffalo ever since, and that he also had a sister residing in New York. If, therefore, he had taken any pains to inquire as to the situation and conduct of his wife, as it was his duty to do if he was not wholly indifferent on the subject, he must have known that she was married to Morin and living with him as his wife. There is nothing, indeed, in this case, as it is presented before me by the testimony, to induce me to wish to extend any legal principle for the purpose of dissolving the marriage with the defendant. Although the wife does not appear to make any ob-

jection, public policy requires that a husband who has abandoned his wife for such a length of time, and suffered her to contract a second marriage on the supposition that she was released from the obligation of the first, should not, four or five years after the death of the second husband, be permitted to blast the character of his wife and bastardize the issue of the second marriage; and when it is more than probable, from the ex parte testimony which he has himself produced, that the whole fault rests upon his own shoulders, in improperly deserting the wife of his bosom within a very few months after his marriage, whom he had promised to love, cherish, and protect until death.

If there are any facts which could have presented this case in a more favorable light, I can only regret that they have not been brought before me by the complainant's bill, and by the proofs which he was authorized to produce before the master. As it is, I can only decree a dismissal of the bill. But it may be without prejudice to his rights, if he supposes he can, upon a new bill, present a case entitling him to a divorce for any misconduct of his wife subsequent to the death of Morin.

GALL v. GALL.

(114 N. Y. 109. Court of Appeals [Second Div.] of New York, 1889.)

Contract of Marriage. — Cohabitation. — Second Marriage in Absence of First Wife.

Vann, J. By this action, the plaintiff, alleging that she was the lawful wife of one Joseph Gall, deceased, sought to recover dower in the lands of which he died seized. As she made no effort to prove a ceremonial marriage between herself and Mr. Gall, the decision of the issue turned primarily upon the inference to be drawn from certain acts and declarations of the parties, and their marital reputation among their acquaintances.

The competency of the plaintiff to contract marriage with Mr. Gall was questioned upon the ground that she had been previously married to one John Jerman, who was still living, undivorced, at the time of the trial. It was conceded that she had no right to

marry Mr. Gall, provided her marriage to Mr. Jerman was valid. This depended upon the competency of Jerman to marry, as he had a living wife, Helena, from whom he had not been divorced at the time he married the plaintiff. The competency of Jerman to marry the plaintiff rested upon that provision of the Revised Statutes which permits a man already married to marry again, provided his former wife shall have absented herself for the space of five successive years without being known to him to be living during that period. 3 R. S. (7th ed.) 2332, § 6.

Thus upon the trial there arose three questions of fact, which were submitted to a jury for decision in the following form: —

- 1. Did Helena Jerman, the first wife of John Jerman, absent herself for the space of five years prior to the marriage of Jerman to the plaintiff, within the meaning of the statute upon that subject?
- 2. Was said Helena Jerman known to John Jerman to be living during the period of five years immediately preceding his marriage to the plaintiff?
- 3. Did the plaintiff and Joseph Gall, deceased, at any time between the month of February, 1883, and the decease of said Gall, intermarry?

The jury, after answering the first question in the negative, and the second and third in the affirmative, found a general verdict for the plaintiff.

The first question presented for decision is whether, within the rules governing appeals to this Court, there was sufficient evidence to support the findings of the jury. The determination of this question requires a somewhat extended examination of the facts as the jury may be presumed to have found them.

Joseph Gall died on May 22, 1886, in the eighty-second year of his age. He married in early life, and his wife, after living with him for many years, died on the 23d of February, 1883, leaving no children. The plaintiff, under the name of Amelia Stieb, was employed in the family as an ordinary servant from 1877 until the death of Mrs. Gall, and after that event she continued to serve Mr. Gall for a time in the same capacity at his residence, No. 4 Rutherford Place, in the city of New York. During this period the outward relations, at least, between Mr. Gall and the plaintiff were simply those of master and servant. She cooked his meals and kept his house, but did not sit at his table, nor apparently

have any unusual privilege. During the spring or summer of 1883, however, a criminal intimacy sprang up between them, and in the fall, believing that she was pregnant by him, he requested his physician to make a physical examination, which resulted in the discovery that she was with child. He thereupon gave up his establishment at No. 4 Rutherford Place, and took rooms at the Westminster Hotel, while she removed to a tenement house, where he supported her and furnished her with a servant. In February, 1884, the plaintiff was delivered of a daughter, of whom he acknowledged in many ways that he was the father. In May, 1884, he moved her to a house in Brooklyn, recently purchased by him for the purpose, where she lived with her mother, brother, and sister, all supported by him.

He stated at the time, to one person, that he bought this house for his wife and child, and to another, that he bought it for his family. Previously he had called plaintiff's mother "Mrs. Stieb," but after this he habitually called her "mother," and once told her that the plaintiff was his wife. In May, 1884, he went to Europe, returning in July, when he resumed his rooms at the Westminster; and thereafter, until March, 1886, he visited the plaintiff at the house in Brooklyn from one to three times a week, generally remaining over night, and usually from Saturday evening until Monday morning. They occupied the same bed, ate at the same table, and all of their apparent relations were those of husband and wife.

From the time the plaintiff began to live in the Brooklyn house until the date of his death, he treated her in that locality as his wife, and she was reputed in that neighborhood to be his wife. He introduced her as such to the neighbors; spoke to her and of her to servants and others having business in the house as his wife; referred mechanics to "Mrs. Gall" for further particulars in making repairs that he had ordered; directed plumbers to do whatever his wife ordered, and said that he would pay for it; and said to plaintiff's sister and her husband, as he gave them a present on their wedding anniversary, "This is a small present from myself and wife." On one occasion, Mr. Gall, the plaintiff, and the child were at Rockaway Beach, and as he was dancing around with the child the people were making remarks about it, and asked him whether that was his child, when he answered: "Yes, that is my child, and there is my wife." A few months

before his death, he said to his partner in business that he was not going to Europe that year because he expected an increase in the family; and, on being asked if he was actually married to the plaintiff, said that he had taken legal advice on the matter, and that, according to the laws of the State of New York, he was married to her. When urged, on the same occasion, to have a ceremony performed for the sake of the children, "one living, one coming," he said that he did not care to make his private affairs public. In March or April, 1886, he left his rooms at the hotel and moved his furniture to the house in Brooklyn, stating that he went there to reside permanently, and thenceforward he did reside there until his death.

It was conceded that while Mr. Gall was at the Westminster Hotel he lived by himself, without any relations to the plaintiff or her family, so far as his life there was concerned.

His old acquaintances, many of them persons of position, supposed that he was a widower. Aside from his business partner, he does not appear to have told any of them that the plaintiff was his wife. Only one other of his old friends, however, seems to have known that he cohabited with her, and he said nothing to him upon the subject, although he was the physician employed by Mr. Gall to attend the plaintiff upon the birth of the child. few of his old acquaintances, who did not know of his intimacy with her, or that he had had a child by her, he spoke of the plaintiff as his cook or his housekeeper. He did not take her to see his relatives or old friends, or to the places which he frequented. On one occasion, when joked about getting married again, he said that he would not marry the best woman who ever trod in shoeleather; and on another, that he would not marry the best girl that ever lived. To one person he said that he was a married man, but his wife was dead; and to another, about six weeks before his death, that he should never marry again. He made other declarations of like character; but none of the persons to whom these statements were made appear to have known of the plaintiff's existence.

Prior to leaving Rutherford Place, on the 1st of January, 1884, the plaintiff disclaimed being Mrs. Gall. She did not attend the funeral of Mr. Gall; but she was advised not to, on account of her condition, being that of advanced pregnancy. The second child, also a daughter, was born in July, 1886, about two months after

the death of Mr. Gall, who, before he died, said that he was the father of the unborn child.

In October, 1882, Charles Funckenstien, a nephew of Mr. Gall, came from California, at his request, to live with him. In April, 1883, by due course of procedure, the name of Mr. Funckenstien was changed, at his uncle's desire, to Charles F. Gall, and thereafter he was known as the adopted son of Joseph Gall. April 3, 1883, Mr. Gall made his will, in which he directed that his body should be buried by the side of his beloved wife, Elizabeth Ann, and, after making certain bequests, gave all the rest of his property to his nephew, Charles Funckenstien. April 28, 1884, by a codicil to said will, he bequeathed \$1,000 to "Amelia Stieb, servant of my late wife," and \$5,000 "to the child of said Amelia, Betsey A. Gall, now of the age of two months."

In August, 1871, the plaintiff was married to John Jerman, knowing that he had been married before, but believing that he was divorced. She lived with him until 1875, when, learning that he had not been divorced, she left him. Jerman was married to Helena Pfeiffer on October 28, 1865, and lived with her about two weeks, when she left him. Six months later he found her in a house of assignation, and shortly afterward they met at the office of a lawyer, who prepared articles of separation, which they signed in the presence of witnesses, and each took a copy. He never saw her again, but believed that the articles of separation were a divorce. In 1870 he heard that she was dead. In fact she was living as late as 1873, two years after his marriage to the plaintiff, and was seen during that year in Indianapolis and New York. She was also seen in New York in 1866, about one year after the separation; but, except as mentioned, she seems to have "disappeared entirely out of her former family relations." She led a loose life, and wandered from place to place. Jerman never inquired to find out where she was, except on one occasion, when he asked an acquaintance, who said that he did not know anything about it. He continued to live in the same neighborhood as when he married Helena, and knew her brothers and sisters, her aunt and cousin, and others of her relations, and where some of them lived. He heard once that her family had moved West, but made no effort to find out about them or about her. He told the plaintiff, both before and after he married her, that Helena was living, but that he had a divorce from her. There

was some conflict in the evidence. The plaintiff and some of her witnesses were somewhat discredited; but, as all questions of credibility were exclusively for the jury, they were warranted in finding the facts as already stated.

Did these facts authorize the jury to draw the final inferences necessary to uphold their verdict?

The cohabitation, apparently decent and orderly, of two persons opposite in sex, raises a presumption, of more or less strength, that they have been duly married. While such cohabitation does not constitute marriage, it tends to prove that a marriage contract has been entered into by the parties. Where, however, the cohabitation is illicit in its origin, the presumption is that it so continues until a change in its character is shown by acts and circumstances strongly indicating that the connection has become matrimonial. It is sufficient if the acts and declarations of the parties, their reputation as married people, and the circumstances surrounding them in their daily lives, naturally lead to the conclusion that, although they began to live together as man and mistress, they finally agreed to live together as husband and wife. Caujolle v. Ferrie, 23 N. Y. 90; O'Gara v. Eisenloher, 38 id. 296; Badger v. Badger, 88 id. 546, 554; Hynes v. McDermott, 91 id. 451, 457.

A present agreement between competent parties to take each other for husband and wife constitutes a valid marriage, even if not in the presence of witnesses. Clayton v. Wardell, 4 N. Y. 230; Caujolle v. Ferrie, supra; Brinkley v. Brinkley, 50 id. 184, Such a marriage may be proved by showing actual cohabitation as husband and wife, acknowledgment, declarations, conduct, repute, reception among neighbors and relations, and the like. And where the intercourse was illicit at first, but was not then accompanied by any of the evidences of marriage, and subsequently it assumes a matrimonial character, and is surrounded by the evidences of a valid marriage above named, a question of fact arises for the determination of the jury. are to weigh the presumption arising from the meretricious character of the connection in its origin with the presumption arising from the subsequent acknowledgment, declarations, repute, etc., and decide whether all of the circumstances taken together are sufficient evidence of marriage.

The application of these principles to the facts of this case

leaves no doubt that the jury was warranted in finding that the plaintiff and Mr. Gall were married. The only evidence of the time when their intercourse began is the pregnancy of the plaintiff, discovered in August or September, 1883. They were not then living together as husband and wife, but as master and servant. She did not sit at his table, nor, so far as was known, sleep in his bed. They had not held themselves out as married, nor made any acknowledgment or declaration upon the subject. Neither their conduct nor reputation in any way indicated a married relation. The connection was purely licentious, and its only effect was to destroy the presumption of innocence when they began to openly cohabit.

Contrast this state of affairs with that which existed just before the death of Mr. Gall. They were then openly living together as husband and wife, and were recognized as such by the mother, brother, and sisters of the plaintiff, by the physician, the neighbors, and by all who had either social or business relations with them. A child had been born to them, who bore his name, at whose baptism he was present, and whom in every way he acknowledged as his daughter. Neither of them had any home other than that where they openly lived together with their child as a family. He called her his wife in the presence of others, said she was his wife in her absence, and told his old partner in business that according to law they were married. He volunteered to acknowledge both wife and child, when there was no occasion to say anything to save appearances. All of the circumstances surrounding them tended to show that they were married. One fact which affected him only, and hence was immaterial, was inconsistent with the presumption of marriage. He passed as unmarried with his old friends and acquaintances, possibly because he did not wish them to know that he had married his cook. But it was held in Badger v. Badger, supra, that evidence of divided repute must be confined to those who have knowledge of the cohabitation, and that proof that a man was reputed to be unmarried, given by his friends, who knew nothing of the putative wife or of the fact of cohabitation, was mere hearsay. The reputation of Mr. Gall at the Westminster Hotel, therefore, did not tend to explain the character of his cohabitation with the plaintiff.

The competency of the plaintiff to marry Mr. Gall is an important question, depending upon the competency of Jerman, her

first husband, to marry her, as he had a living wife. The statute covering the subject is as follows, viz.: "If any person whose husband or wife shall have absented himself or herself for the space of five successive years, without being known to such person to be living during that time, shall marry during the lifetime of such absent husband or wife, the marriage shall be void only from the time that its nullity shall be pronounced by a court of competent authority."

Assuming that the declaration of Jerman that his first wife was alive was incompetent evidence to establish the fact that she was not known to him to be living during the statutory period, still, as no objection was made, it was not error to receive it. fendants, however, insist that there was no other evidence upon the subject, and that a verdict resting only upon incompetent evidence, even if received without objection, should not stand. as Jerman's first wife was in fact alive at the time that he married the plaintiff, the question of fact still remained whether he acted in good faith in contracting a second marriage. The section quoted seems to be based upon the probability that the absentee is dead, and is apparently designed to protect the person who in good faith acts upon the statute from evil results if the absentee is actually living. The first marriage is suspended, or, as was held in Griffin v. Banks, 24 How. 213, it is "placed in abeyance," but it is not reinstated by the return of the absentee, because the second marriage becomes void only from the time that it is so declared by a competent court. Otherwise, both marriages would be in force at the same time, and, to this extent, polygamy would be sanctioned by law. The first marriage ceases to be binding until one of the three parties to the two marriages procures a decree pronouncing the second marriage void. 3 R. S. (6th ed.) 142, §§ 36, 37; Code of Civ. Proc. § 1745. A statute with such possibilities should be so construed as to promote good order, and the person availing himself of its privilege should be required to act in perfect good faith. Jones v. Zoller, 32 Hun, 280, 282; Cropsey v. McKinney, 30 Barb. 47; McCartee v Camel, 1 Barb. Ch. 455, 464. He decides the question as to his right to remarry for himself, without application to any court or public authority. The whole responsibility rests upon him. He cannot shut his eyes and ears, and justify a second marriage, because for five years he did not hear of his wife. Did he try to hear of her?

Did he honestly believe she was dead? Did he make inquiry? Were the circumstances such that a reasonable man, honestly desiring to learn the truth, would have made inquiry? Was he excused from inquiring by a false report of her death? Questions of this character are involved in the ultimate question of good faith, which is necessarily for the jury, as it depends upon the inferences to be drawn from a great many circumstances.

In this case, it was their duty to determine whether Jerman, in deciding that he had the right, relying upon the statute, to marry again, acted as a reasonable man, desiring to act in good faith, would have acted under the same circumstances. Whether he relied upon his supposed divorce, or upon the report that his wife was dead, instead of upon the statute, was for the jury to say. They were also to consider his opportunity for making inquiries, and the effect of his omission to do so. The facts warranted their conclusion that he did not act in good faith, and hence that his marriage to the plaintiff was void.

We have examined the exceptions relating to evidence, and find but one that requires attention. The Court received in evidence, against objection and exception, the inscription "J. G. to A. S." upon a ring proved to have been worn by the plaintiff in the spring of 1883, but which the testimony did not connect with Mr. Gall. The Court, of its own motion, struck the evidence out, and excluded the ring. We do not think this was error. The evidence was stricken out immediately after it was received, and before it had had time to produce any permanent impression upon the minds of the jury. Even when great care is used upon a trial, incompetent evidence will occasionally creep in. A witness may make a voluntary statement, or an answer that is not responsive, or the trial judge may admit something the exact bearing of which he fails at the moment to perceive. this be remedied by striking it out? Must the Court stop in the midst of a long trial, and discharge the jury, because it is possible that the jurors, in violation of their duty, may give heed to evidence which is no longer in the case, but which was promptly struck ont in their presence? Such a rule would seriously impede public business, and lead to needless multiplication of trials. It would be opposed to the modern tendency both of legislation and judicial decisions. Platner v. Platner, 78 N. Y. 90; Pontius v. People, 82 id. 339.

We are referred to Erben v. Lorillard, 19 N. Y. 299, but in that case the incompetent evidence was not struck out, although the judge in charging the jury told them to pay no attention to it. In People v. Smith, 104 N. Y. 491, a capital case, the danger of prejudice to the defendant was much greater than it was in the case under consideration. While it is the better practice, in addition to striking out the evidence, to carefully instruct the jury to disregard it, still, as no request was made that this should be done, the defendant cannot predicate error upon that omission.

The judgment should be affirmed.

All concur, except HAIGHT and PARKER, JJ., dissenting, and Brown, J., not voting.

Judgment affirmed.

JACKSON v. WINNE.

(7 Wend. 47. Supreme Court of New York, 1831.)

Contract of Marriage. — Solemnization before Justice of the Peace. — Question of Duress.

This was an action of ejectment, tried at the Delaware Circuit in November, 1828, before the Hon. Ogden Edwards, one of the Circuit Judges.

The lessors of the plaintiff claimed to recover the premises in question in the right of Parthenia, the wife of Dies, as the heir at law of Enoch Copley, deceased. The defence set up was, that the marriage of Enoch Copley with the mother of Parthenia was not valid, and that Enoch Copley, by his last will and testament, had The facts in relation to devised all his real estate to three sons. the marriage of Copley and the mother of Parthenia were somewhat peculiar. About the year 1800, Copley was arrested on a warrant issued on the complaint of the overseers of the poor of the town of Blenheim, in the county of Schoharie, under the bastardy act, on a charge of having gotten Joanna Desilva, the mother of Parthenia, with child; he was taken to the house of Joanna's father, from whence he went in company with Joanna, her father, mother, and the constable to the house of Cornelius Lanes, Esq., a justice of the peace, to be married; the justice

asked Copley and Joanna if they consented to be married, and told them to join hands; Copley dropped his hand and turned from Joanna; she took it and held it, until they were pronounced man and wife. Upon Copley refusing to take the hand of Joanna, the justice hesitated, but after a minute or two proceeded, concluded the ceremony, and pronounced them man and wife. Copley, during the whole time, said nothing. It was the custom of this justice, when he performed a marriage ceremony, to make a prayer, but upon this occasion he declined doing so; Desilva, the father of Joanna, however, made a prayer, and after the parties were gone the justice told his wife, or the constable, that he did not feel right to make a prayer, and therefore put it on Desilva. Joanna returned to her father's house, but Copley did not return with her, and they never cohabited after their marriage. Three days afterwards Copley married another girl, one Mary B., who became a mother about the same time that Parthenia, the daughter of Joanna, was born, which was between three and six months after the marriage of Joanna; about a month after his marriage, Copley told a witness in this cause that he married Joanna on Thursday, and on the succeeding Sunday he married Mary. Copley lived with Mary B. until her death, in 1812; he had by her one daughter, who is now living. After the death of Mary B. he married the defendant in this cause, by whom he had six children. Joanna also, some years after 1800, became the wife of another man, and is now living. As to the other part of the defence, a will of Copley's was proved, bearing date the 31st May, 1827, whereby he gave one third of his real and personal estate to his wife Elizabeth (the defendant in this cause), during her natural life, if she should remain his widow; and then to return to his three sons, George, William, and Myron, if they should live till after the decease of their mother; then, after pecuniary bequests to his daughters, and a small legacy to Parthenia Copley, the daughter of Joanna Desilva, and wife of John Dies, follows a clause in these words: "I also give and devise unto my three sons, George, William, and Myron, the remainder of my property, both real and personal estate, if they should live to come of age, and their mother's thirds after her decease, if she remains my widow." The eldest of these children is fourteen, and the youngest between three and four years of age. In October, 1828, but probably after the commencement of this suit, the defendant married one Flansbury. A verdict was found for the plaintiff, subject to the opinion of this court.

The maxim of the civil law, Nuptias non BY THE COURT. concubitus sed consensus facit, Dig. L. 50, tit. 17, § 30, or one of the same import, has ever been regarded in courts of common law as a good definition of marriage. There is an expression in Wood's Institutes of the Laws of England, Inst. 57, which, if examined without its context, might seem to imply that cohabitation as well as consent was required to make a valid marriage. "Marriage or matrimony," he observes, "is an espousal de præsenti, and a conjunction of man and woman in a constant society;" but the very next sentence is a translation of a Latin maxim, similar to the one quoted from the civil law. "Mutual consent," he says, "makes the marriage before consummation." language of Jacob, in his Dictionary, tit. Marriage, is less liable to misconstruction. He says: "Nothing more is necessary to complete a marriage, by the laws of England, than a full, free, and mutual consent between parties" not incapable of entering into such a state. Wood, in his Institute of the Civil Law, p. 120, says that "Espousals de præsenti or marriage is contracted by consent only, without carnal knowledge." To ascertain whether a valid marriage was actually solemnized between Copley and Joanna Desilva, we are to look at their situation when before the justice, and what took place on that occasion. The evidence is very satisfactory that they went before him expressly for the purpose of solemnizing their matrimonial contract, and that Copley yielded his consent to it.

Was that consent the result of duress? There is nothing to warrant such conclusion, besides the fact that Copley was in the custody of the constable on a proceeding instituted by the overseers of the poor. The necessary consequence of his marriage was a discharge from any liability to them. If a co-habitation had followed the alleged marriage, neither Copley himself, nor any other person, would have been listened to, if he had attempted to establish its nullity upon the ground of his restraint. We will not say that we ought to disregard entirely the subsequent conduct of the parties in settling the question as to his free consent. The rule of law on this subject, as established in England, it appears to us, it would be safe and judicious to

follow, although it be the rule of an ecclesiastical court. long since the jurisdiction in most matters relating to marriages passed from the courts of law in that country to the ecclesiastical courts. If the parties to an alleged matrimonial contract are infra annos nubiles, the ecclesiastical judge passes upon the assent, and determines what is a sufficient assent, and what not. certificate is the proof required, and where he has cognizance, courts of law give, and it is necessary to the administration of justice that they should give, the same credit to the sentence of an ecclesiastical tribunal as such a tribunal is bound to yield to the judgments of the common law courts on matters within their jurisdiction. 2 Lilly's Abr. 244, c. It is very evident that the ecclesiastical court, in deciding upon the sufficiency of the assent of the parties, can regard only what takes place at the ceremony. We ought therefore to confine our attention almost exclusively to the facts attending the espousals before the justice; and, doing so, we cannot say that the mere circumstance that Copley had involved himself in difficulty with the overseers of the poor by his previous connection with Joanna, and that he took the step he did with some reluctance, is enough to show that he did not yield his full and free assent to the marriage solemnized before the justice. To nullify on such slight grounds so solemn a contract as that of marriage would jeopardize, in too many instances, the blessings which spring from the dearest civil and social relation. We are therefore bound to say that Copley's marriage with Joanna was valid, and, she being still alive, he consequently can have no legitimate issue by any other woman. Parthenia, one of the lessors of the plaintiff, is his only heir at law.

Whether Parthenia inherits anything from him depends upon the construction of his will. The devise in the will is as follows: "I also give and devise unto my three sons, George, William, and Myron, the remainder of my property, both real and personal estate, if they should live to come of age, and their mother's thirds, after her decease, if she remains my widow." One third part of his real and personal estate, by a previous clause in the will, had been given to the defendant, during her natural life, if she should remain his widow. It seems not to be necessary to the decision of the question now before us, to determine whether the estate given to Copley's three sons commenced in præsenti, to be

enjoyed in futuro, or whether it will vest when they arrive at the age of twenty-one years. We would depart wholly from the language of the devise, should we decide that the sons were entitled to the immediate possession of the property. They cannot have it during their minority. Who has it until they are of age? The heir at law undoubtedly. It is not necessary that we should enter at large into the consideration of the nature of the estate which the heir takes; it may not, however, be improper to say that the case of Rogers v. Ross, 4 Johns. Ch. R. 388, is a strong authority to show that she takes as a trustee, and not in her own right. It is not reasonable to conclude that the testator intended to produce such a result; but we cannot avoid coming to it, if we look to the language he has employed, and apply to it the established rules of law.

From the examination of the plaintiff's points, it appears that he does not press his claim to more than two third parts of the premises. To this extent he is entitled to recover. We do not mean to intimate an opinion, that, had he insisted on more, judgment for more would have been given. Our impressions are strongly to the contrary.

Judgment for plaintiff, for two thirds of the premises.

REYNOLDS v. REYNOLDS.

(3 Allen, 605. Supreme Judicial Court of Massachusetts, 1862.)

Contract of Marriage. — Fraud.

LIBEL for a sentence of nullity of marriage, setting forth that the libellant was married to the respondent on the 11th of October, 1856; that he was then only seventeen years of age, and the respondent was thirty years, or over; that he had been acquainted with her for only about six weeks; that he was induced to marry her by means of her false and fraudulent representations that she was a chaste and virtuous woman, which he believed to be true; and that her friends with whom she then lived represented to him, at her procurement, that she was honest and virtuous; but in truth she was not virtuous, but was at the

time of the marriage pregnant with child by some person to the libellant unknown, of which child she was delivered on or about the 7th of March, 1857, and the libellant did not thereafter live or have any intercourse with her.

The respondent filed a demurrer, and the case was reserved by Dewey, J., for the determination of the whole court.

- S. H. Folsom, for the respondent.
- L. H. Wakefield, for the libellant.

BIGELOW, C. J. The libel in the present case is the first one which has been brought under that provision of the statute enacted by St. 1855, c. 27, and re-enacted by Gen. Sts. c. 107, § 4, which authorizes this court to grant a divorce where a marriage is supposed to be void, or the validity thereof is doubted, on the ground of fraud. It is quite obvious, from the terms in which the statute is expressed, that it was founded on the assumption that a marriage into which one of the parties was induced to enter through the fraud and deception of the other, is null and void, and, like other contracts, may be annulled and set aside by the defrauded party. The statute does not provide that fraud shall vitiate a contract of marriage, but only confers an authority on the court to decree a dissolution of the marriage for such cause, as in other cases of nullity. Nor does it define or in any way prescribe the nature of the fraud, or the degree or amount of deception which shall be deemed to be sufficient to warrant the court in adjudging the contract to be void. This is left to be determined on general principles applicable to all contracts, subject only to such restrictions and modifications as necessarily arise and grow out of the peculiar nature of the contract of marriage. Indeed, it would be difficult, if not impossible, to lay down any general rule or definition which would comprehend all cases coming within the range of the legal import of the word fraud. A learned writer terms fraud hydra multorum capitum. An inquiry into the fraudulent intent and conduct of parties necessarily involves an investigation of facts; and as no two cases are precisely alike in their circumstances, it follows that the question whether fraud exists sufficient to vitiate a contract always depends very much on the nature of the transactions, the means of information possessed by the parties, and their relative situation and condition towards each other. The only general rule which can be safely stated is, that to render a contract void on the ground of fraud there must be a fraudulent misrepresentation or concealment of some material fact. What amounts to such misrepresentation or concealment, and whether the fact misstated or withheld is material, are questions to be decided according to the circumstances developed in each case, as it arises for judicial determination.

While, however, marriage by our law is regarded as a purely civil contract, which may well be avoided and set aside on the ground of fraud, it is not to be supposed that every error or mistake into which a person may fall concerning the character or qualities of a wife or husband, although occasioned by disingenuous or even false statements or practices, will afford sufficient reason for annulling an executed contract of marriage. In the absence of force or duress, and where there is no mistake as to the identity of the person, any error or misapprehension as to. personal traits or attributes, or concerning the position or circumstances in life of a party, is deemed wholly immaterial, and furnishes no good cause for divorce. Therefore no misconception as to the character, fortune, health, or temper, however brought about, will support an allegation of fraud on which a dissolution of the marriage contract, when once executed, can be obtained in a court of justice. These are accidental qualities, which do not constitute the essential and material elements on which the marriage relation rests. The law, in the exercise of a wise and sound policy, seeks to render the contract of marriage, when once executed, as far as possible indissoluble. The great object of marriage in a civilized and Christian community is to secure the existence and permanence of the family relation, and to insure the legitimacy of offspring. It would tend to defeat this object, if error or disappointment in personal qualities or character was allowed to be the basis of proceedings on which to found a dissolution of the marriage tie. The law therefore wisely requires that persons who act on representations or belief in regard to such matters should bear the consequences which flow from contracts into which they have voluntarily entered, after they have been executed, and affords no relief for the results of "a blind credulity, however it may have been produced." Ewing v. Wheatley, 2 Hagg. Con. 175-183; Wakefield v. Mackay, 1 Phillimore, 134, 137, n.; 1 Fraser's Dom Rel. 230; Bish. Mar. and Div. §§ 100, 101. Nor is it unreasonable that each one should take on himself the burden of inquiring into

representations concerning the character and qualities of the person whom he intends to marry, which, by the exercise of due caution and discretion, can be ascertained to be true or false, instead of lying by and using them to defeat a contract after it has become executed, and a portion of its fruits has been enjoyed. The only doubt which has arisen as to the wisdom or expediency of this doctrine has been occasioned by cases of antenuptial incontinence and want of chastity in females. It has been maintained by some writers, especially by commentators on the civil law, that chastity in woman is a quality which lies at the foundation of the contract of marriage, and constitutes one of its essential elements, and that any misrepresentation or concealment, by which a man has been led to believe that a woman whom he has married was chaste and virtuous, who, prior to the marriage, had been in fact defiled and debauched, was good ground for impeaching and vacating the marriage. Voet, 24, 2, 15; 1 Fraser's Dom. Rel. 231, and authorities there cited. But the better opinion seems to be that chastity stands on the same ground as other personal qualities; that there is nothing in the contract of marriage which implies that a woman shall have previously been pure and undefiled, or which renders unchastity prior to the execution of the contract an impediment to a valid marriage. It is doubtless true that in many cases the knowledge of such defect would prevent the consummation of the contract, and under certain circumstances might justify a man, while it was executory, in refusing to perform it. But a different rule applies when the contract has been executed. Nothing can then avoid it which does not amount to a fraud in the essentialia of the marriage relation. And as mere incontinence in a woman prior to her entrance into the marriage contract, not resulting in pregnancy, does not necessarily prevent her from being a faithful wife, or from bearing to her husband the pure offspring of his loins, there seems to be no sufficient reason for holding misrepresentation or concealment on the subject of chastity to be such a fraud as to afford a valid ground for declaring a consummated marriage void. In regard to continence, as well as to other personal traits and attributes of character, it is the duty of a party to make due inquiry beforehand, and not to ask the law to relieve him from a position into which his own indiscretion or want of diligence has led him. Certainly it would lead to disastrous consequences if a woman who had once fallen from virtue could not be permitted to represent herself as continent, and thus restore herself to the rights and privileges of her sex, and enter into matrimony without incurring the risk of being put away by her husband on discovery of her previous immorality. Such a doctrine is inconsistent with reason and a wise and sound policy. Bish. Mar. and Div. § 105; Scroggins v. Scroggins, 3 Dev. 535, 544; 1 Fraser's Dom. Rel. 231; Graves v. Graves, 3 Curteis, 235; Best v. Best, 1 Addams, 411.

But a very different question arises where, as in the case at bar, a marriage is contracted and consummated on the faith of a representation that the woman is chaste and virtuous, and it is afterwards ascertained, not only that this statement was false, but that she was at the time of making it and when she entered into the marriage relation pregnant with child by a man other than her husband. The material distinction between such case and a misrepresentation as to the previous chastity of a woman is obvious and palpable. The latter relates only to her conduct and character prior to the contract, while the former touches directly her actual present condition and her fitness to execute the marriage contract and take on herself the duties of a chaste and faithful wife. It is not going too far to say, that a woman who has not only submitted to the embraces of another man, but who also bears in her womb the fruit of such illicit intercourse, has during the period of her gestation incapacitated herself from making and executing a valid contract of marriage with a man who takes her as his wife in ignorance of her condition and on the faith of representations that she is chaste and In such a case, the concealment and false statement go directly to the essentials of the marriage contract, and operate as a fraud of the gravest character on him with whom she enters into that relation. As has been already stated, one of the leading and most important objects of the institution of marriage under our laws is the procreation of children, who shall with certainty be known by their parents as the pure offspring of their union. A husband has a right to require that his wife shall not bear to his bed aliens to his blood and lineage. This is implied in the very nature of the contract of marriage. Therefore a woman who is incapable of bearing a child to her husband at the time of her marriage, by reason of her pregnancy by another man, is unable

to perform an important part of the contract into which she enters; and any representation which leads to the belief that she is in a marriageable condition is a false statement of a fact material to this contract, and on well settled principles affords good ground for setting it aside and declaring the marriage void.

This conclusion is strengthened by a consideration of the consequences which might result from a different doctrine. The rule of the common law is, that, if a man marry a woman who is with child, it raises a presumption that the child with which she is pregnant was begotten by him. This presumption is founded on the supposed acknowledgment of paternity by the subsequent act of marriage, and although such presumption is liable to be rebutted, yet in the absence of proof it stands. Hemmenway v. Towner, 1 Allen, 209; Phillips v. Allen, 2 Allen, A man, therefore, who has contracted a marriage with a woman under such circumstances, if he could not obtain a divorce on the ground of fraud, would be subjected to the painful alternative of disowning the child, and thereby publishing to the world the shame of her who was still to remain his wife, or suffer the presumption of legitimacy to stand, and admit the child of another to share in his bounty and receive support in like manner as his own legitimate children. There is no sound rule of law or consideration of policy which requires that a marriage procured by false statements or representations, and attended with such results upon an innocent party, should be held valid and binding on him. An enforced union under such circumstances would not tend to promote morality or give dignity or sanctity to the institution of marriage. On the contrary, it would tend to bring it into contempt, by compelling parties to continue in the relation of husband and wife after the basis of confidence and harmony has been taken away by the destruction of mutual respect and affection.

It is not to be overlooked, in the consideration of the question whether ante-nuptial pregnancy should constitute a sufficient ground of divorce, where it is unknown and kept concealed from the husband, and the marriage is contracted on the faith that the woman is chaste and virtuous, that the existence of the fact cannot be ascertained before marriage by any of the ordinary means of personal intercourse, or by careful and diligent inquiry. Nor would it be known after marriage in the earlier

stages of gestation, nor even at a later period, where, as in the case at bar, the husband was immature and inexperienced. Such a case does not come within the principle which requires persons to act with caution, and after due inquiry concerning the personal qualities and character of those with whom they intend to contract marriage.

We do not mean to be understood as saying that pregnancy in a woman before marriage is a valid ground of divorce, where the husband, after having good reason to know the fact, continues his cohabitation and takes no immediate steps to repudiate his wife. Nor do we express any opinion concerning another class of cases which have arisen, where the pregnancy of the woman has been known to the husband, and he has been induced to enter into the contract of marriage by false representations that he was the father of the unborn child. We confine our judgment to the precise case stated in the libel. Assuming the facts therein stated to be true, and that, on discovery of the fraud, the husband left the wife and took immediate steps to annul the marriage, we think he shows a sufficient ground to ask for a sentence of nullity of marriage. See Morris v. Morris, Wright, (Ohio,) 630; Ritter v. Ritter, 5 Blackf. 81; Scott v. Shufeldt, 5 Paige, 43; Baker v. Baker, 13 California, 87.

Demurrer overruled.

WINSMORE v. GREENBANK.

(Willes, 577. Court of Common Pleas, 1745.

Husband's Action for Enticement of Wife.

Skinner, Willes, and Hayward, Serjeants, moved for a new trial upon several affidavits, setting forth (as they were opened) that the verdict was against evidence and the damages excessive, being 3,000l.

The action was an action on the case for enticing away and detaining the plaintiff's wife, which were laid in the declaration with several other particular circumstances; but my brother Abney who tried the cause, being in court and certifying that the verdict was not against evidence nor the damages excessive, and that

he was not dissatisfied with it, we would not make any rule, nor did we suffer the affidavits to be read.

Hayward, likewise, mentioned another objection, that the judge would not allow the declarations of the wife to be given in evidence on either side; but the two senior counsel would not insist on that objection, and my brother Burnett and I were of opinion that my brother Abney did right in refusing to admit such evidence.

They then moved in arrest of judgment.

In order to understand the grounds of the motion in arrest of judgment, it is necessary to state some parts of the record.

The declaration contained four counts. The first stated that on the 1st of January 1741, Mary, then and until the 24th of December, 1742, being the wife of the plaintiff, (but since deceased,) unlawfully and without his leave and against his consent departed and went away from him, etc., and lived and continued absent and apart from him from thence until and upon the 8th of August, 1742, and during the said time that the said Mary so lived and continued absent a large estate both real and personal, to the value of 30,000l., was devised to her by W. Worth, D.D., her late father, for her sole and separate use and at her sole and separate disposal; that thereupon she was desirous of being and intended to be again reconciled to the plaintiff, and to live and cohabit with him, whereby he would have had and received the benefit and advantage of the said real and personal estate (the plaintiff being willing and desirous to be reconciled, etc.); yet the defendant, knowing the said premises and having notice of the said Mary's intention, but contriving to injure the plaintiff and to prevent Mary the wife from being reconciled to him, etc., and to prevent the plaintiff receiving any advantage from the said real and personal estate, etc., on the 8th of August, 1742, unlawfully and unjustly persuaded, procured, and enticed the said Mary to continue absent and apart from the plaintiff, and to secrete, hide, and conceal herself from the plaintiff, by means of which persuasion, procuration, and enticement the said Mary from the said 8th of August, 1742, until the time of her death on the 24th of December, 1742, continued absent and apart and secreted herself, etc., whereby the plaintiff during all that time totally lost the comfort and society of his said wife and her aid and assistance in his domestic affairs, and the profit and advantage that he would

and ought to have had of and from the said real and personal estates, etc., and was put to great charges and expenses in endeavoring to find out and gain access to his said wife, in order to persuade and procure her to be reconciled to him.

The second count stated that on the 7th of August, 1742, Dr. Worth died, on whose death the plaintiff's wife became seized and possessed of real and personal estates to the value of 30,000l. to her sole and separate use and at her sole and separate disposal; yet the defendant, maliciously and wickedly intending to injure the plaintiff and to deprive him of the said aid, assistance, and comfort of his wife, and to raise, foment, and continue discords and quarrels between the plaintiff and his wife, and to alienate the affections of the wife from the plaintiff and to deprive the plaintiff from having or receiving any advantage or benefit from the said estates, etc., on the 8th of August, 1742, unlawfully and unjustly persuaded, procured, and enticed the said wife to depart and absent herself from the plaintiff and to secrete herself from him, by means of which persuasion, procuration, and enticement the said Mary on the said 8th of August departed and absented herself from the plaintiff without the plaintiff's consent, and continued absent until her death, etc., whereby the plaintiff, etc. (as in the first count).

The third count stated that on the 8th of August, 1742, the plaintiff's wife, without and against his consent, went away from him and went to the defendant; yet the defendant, well knowing the said Mary to be the wife of the plaintiff, received her, and concealed her from the plaintiff and kept her so concealed from him until the time of her death, and wholly refused to deliver her to the plaintiff or to discover her place of residence (although on, etc., at, etc., he was requested, etc.), but unlawfully entertained, harbored, concealed, and secreted her from the plaintiff from the 8th of August, 1742, until the time of her death, whereby the plaintiff, etc. (as before, only omitting that the plaintiff was deprived of the benefit of her fortune, etc.).

The fourth count stated that the defendant harbored and concealed the plaintiff's wife until her death, and also caused her to be buried secretly and kept her death a secret from the plaintiff for a year after her death, etc., whereby the plaintiff lost the comfort and society of his wife from the said 8th of August until the time of her death, and the benefit of her fortune, etc.

The defendant pleaded not guilty, and the jury found a verdict for the plaintiff on the first three counts, and gave 5,000l. damages, and a verdict for the defendant on the last.

This case was argued on the 18th and 26th of November, 1745, and the 29th of January following, by Skinner and Willes, King's Serjeants, and Draper and Hayward, Serjeants, for the defendant, in support of the motion in arrest of judgment, and by Brime and Birch, King's Serjeants, and Bootle, Serjeant, for the plaintiff, and on the 1st of February following the rule to arrest the judgment was discharged.

WILLES, Lord Chief Justice, delivered his opinion to the following effect.

Several objections have been taken by the defendant to this declaration in arrest of judgment,—two general ones and three to the particular penning of the declaration. I admit the rules laid down in most of the cases that were cited, and therefore shall have occasion to mention only a few of them, because they are not applicable to the present case. The first general objection is that there is no precedent of any such action as this, and that therefore it will not lie; and the objection is founded on Lit. § 108, and Co. Lit. 81 b, and several other books. But this general rule is not applicable to the present case; it would be if there had been no special action on the case before. A special action on the case was introduced for this reason, that the law will never suffer an injury and a damage without a remedy; but there must be new facts in every special action on the case.

The second general objection is that there must be damnum cum injuria, which I admit. I admit likewise the consequence that the fact laid before per quod consortium amisit is as much the gist of the action as the other; for though it should be laid that the plaintiff lost the comfort and assistance of his wife, yet if the fact that is laid by which he lost it be a lawful act, no action can be maintained. By injuria is meant a tortious act; it need not be wilful and malicious; for though it be accidental, if it be tortious, an action will lie.

This rule, therefore, being admitted, the only question is whether any such injury be laid here; and this rule will properly come to be considered under the several objections made to the particular counts; for if any of them hold, then no injury is laid. I admit also, that, as the verdict is on three counts and the

damages are entire, if either of the counts be bad, the judgment must be arrested. To the second count no objection was taken.

But the counsel for the defendant began with the third count, to which they took several objections, which are all false in fact.

- 1st. That it is not laid that the wife went away without the husband's consent; but it is expressly so laid.
- 2d. That it is not laid that the defendant knew of it; but it is laid in express terms that he did, and that, knowing it, he concealed and detained her.
- 3d. That no request by the plaintiff to the defendant to deliver up the wife and refusal by the defendant are laid. It is not necessary to determine in this case whether a request and refusal were necessary, because both are expressly laid here; but according to my present thoughts, in the case of a detainer, I think them necessary. And as not guilty to the whole is pleaded in special actions on the case, it puts every fact that is laid in issue. I think it likewise necessary to prove the request and refusal, and we must take it that this was so proved at the trial, the jury having found a verdict for the plaintiff.

The principal objections were to the first count, and they were three: —

- 1st. That procuring, enticing, and persuading are not sufficient, if no ill consequence follows from it.
- 2d. That unlawfully and unjustly will not help the case, but the particular methods made use of should have been stated by which the defendant procured, etc.; otherwise, this is leaving the law to a jury.
- 3d. That no notice or request is laid, which is necessary in the case of the continuance, though it be not necessary if the defendant had at first persuaded her.

To the first there were two answers: -

- 1st. That here is a consequence laid that by means thereof the plaintiff lost the comfort and society of his wife, and the profit and advantage of her fortune, etc.
- 2d. Whether "enticing" goes so far or not, I will not nor need determine, because "procuring" is certainly "persuading with effect." I need not cite any authorities for this, because every one who understands the English language knows that this is the common acceptation of that word.

But to be sure it must be an unlawfully procuring, and that

brings me to the second objection. It is not necessary to set forth all the facts to show how it was unlawful; that would make the pleadings intolerable, and would increase the length and expense unnecessarily. It was said, however, that at least it was necessary for the plaintiff to add "by false insinuations;" but it is not material whether they were true or false; if the insinuations were true, and by means of those the defendant persuaded the plaintiff's wife to do an unlawful act, it was unlawful in the defendant.

In answer to the objection that this is leaving the law to the jury, it must be left to them in a variety of instances where the issue is complicated, as burglariter, felonice, proditore, devisavit vel non, demisit vel non. But the judge presides at the trial for the very purpose of explaining the law to the jury, and not to sum up the evidence to them.

And as to the distinction between the beginning and continuance of a nuisance by building a house that hangs over or damages the house of a neighbor, that against the beginner an action may be brought without laying a request to remove the nuisance, but that against the continuer a request is necessary, for which Penruddock's Case, 5 Co. 100, 101, was cited, and many others might have been quoted, the law is certainly so, and the reason of it is obvious. But that reason does not extend to the present case; because every moment that a wife continues absent from her husband without his consent, it is a new tort, and every one who persuades her to do so does a new injury, and cannot but know it to be so.

Several arguments were urged and several cases were cited on both sides of the question, whether defects in this declaration were or were not aided by the verdict; but I shall not take notice of them, because I am of opinion that there are no defects to be cured, and that the declaration would have been good even on a demurrer. Had the words "unlawfully and unjustly" been omitted, this question might have been material, because it is lawful in some instances for the wife to leave her husband; but as the declaration is framed, it is not necessary to enter into the consideration of that question. Many observations were likewise made on the quantum of the damages given by the jury, and it was said that it was uncertain whether or not the husband had sustained any. Those were proper observations on the motion

for a new trial (which has already been disposed of), but cannot have any weight on this motion in arrest of judgment, where everything laid in the declaration must be taken to have been proved.

I can see no reason to arrest this judgment, and therefore I am of opinion that the rule must be discharged.

Mr. J. Abney and Mr. J. Burnerr gave their opinions seriatim, agreeing with the Lord Chief Justice.

Rule discharged.

HEERMANCE v. JAMES.

(47 Barb. 120. Supreme Court of New York, 1866.)

Husband's Action for Alienation of Wife's Affections.

By the Court, Potter, J. The complaint charges, that the defendant, "contriving and wickedly and unjustly intending to injure the plaintiff, and to deprive him of the affections, comfort, fellowship, society, and assistance of Rachel, hi wife, did, at, etc., wrongfully and unlawfully purpose, plan, and undertake to alienate the affections of his (the plaintiff's) said wife, and did then and there, for the accomplishment of such purpose," (by various professions and pretences set forth,) "and by false insinuations against the plaintiff, and by other insidious wiles, so prejudice and poison the mind of the said Rachel against the plaintiff, and so far alienate her affections from her said husband, as to induce the said Rachel to desire and seek to obtain a divorce or separation from the said plaintiff; and that the defendant, on or about the first day of February, 1866, did counsel, advise, aid, and assist the said Rachel in efforts to procure the commencement of proceedings for such divorce or separation, he, the defendant, well knowing that no cause or lawful ground existed for either a divorce or separation. And that the said defendant did, by the means aforesaid, so far prejudice and poison the mind, etc. of the said Rachel against the said plaintiff, and did so far alienate her affections from the plaintiff, as to persuade and induce her to refuse to recognize or receive the plaintiff as her husband;

and that on or about the fifteenth day of March, 1866, the said Rachel, acting under the wrongful and unlawful advice, influence, and direction of the said defendant, did refuse to recognize or receive the plaintiff as her husband, or to live with him as his wife; and said Rachel has from thence hitherto, acting under the like advice, influence, and direction of the said defendant, persisted in such refusal. And by means of the premises the plaintiff has from thence hitherto wholly lost and been deprived of the comfort, fellowship, society, aid, and assistance of the said Rachel, his said wife, in his domestic affairs; and the plaintiff has thereby been otherwise much damnified and injured. Wherefore the plaintiff demands judgment," etc.

Admitting, as a demurrer does, the facts alleged, do they constitute a cause of action? This seems to be the only question in It is insisted that the acts specifically charged are not unlawful, and that therefore no action can be maintained. conclusion from the premises of this proposition is a non sequitur, and is not sound. It is not the act alone, but it is the consequence which may directly or naturally result from an act, for which the party may be responsible; and most especially is this the case when the act is done mischievously, designedly, and wickedly, and with intent to produce the consequences that ensue; and a party is answerable criminally, as well as civilly, for such consequences. The questions, then, in this case, are, were the consequences alleged the direct and natural result of the defendant's acts? and if so, are they the subject of an action, or the ground of damage? I am not able to see anything unnatural in the result, from the premises charged, but the contrary. If, as is admitted by the demurrer, the defendant contrived, and with a wicked intent, tried to deprive the plaintiff of the society, affections, aid, and assistance of his wife, and with such intent did perform the acts alleged; if he did attempt to persuade and induce the plaintiff's wife to refuse to "recognize or receive the plaintiff as her said husband," and if the plaintiff's said wife did afterwards so refuse to recognize or receive her said husband, or to live with him as his wife; if the plaintiff subsequently lost and was deprived of the comfort, fellowship, society, aid, and assistance of his wife in his domestic affairs, it is only legally the direct and natural result of such interference, and is necessarily to be deduced from the facts alleged not only, but it is a fact that stands charged and

admitted upon the record as the consequence of the act of the defendant.

This brings us to the real point in the case to be considered. Does such alienation of the affections of the wife, such refusal to recognize and receive the plaintiff as her husband, and to live with him as his wife, such a deprivation of the comfort, fellowship, and society of a wife, such a loss of her aid and assistance in his domestic affairs, as is charged, though there be no actual physical absence or separation of the wife from him, constitute a cause of action, when caused as charged in the complaint?

Separation is the usual consequence of such interference, and the cases found in the books are, it is true, cases of actual separation from the house and home of the husband; and upon this authority it is insisted that an allegation of pecuniary loss, or loss of services by an actual leaving or continuing away from service, is necessary to make out a cause of action. I do not think that this argument is sound. The gist of the action is the loss of the comfort and society of the wife. Weedon v. Timbrell, 5 Term R. 357, 360. ASHHURST, J. in this case said: "The gist of the action is the loss of the comfort and society of the plaintiff's wife; that is always inserted in declarations of this kind as a material and substantial allegation, and the forms of pleading are evidence of the law." In Hutcheson v. Peck, 5 Johns. 207, 208, Spencer, J. held, even in a case where a father had given protection to his child, who was the plaintiff's wife, "that if he did it maliciously, or improperly, against the will of her husband, and thereby deprive him of comforts he is entitled to enjoy from her aid and society, most undoubtedly an action will lie." This proposition, laid down by Judge Spencer, is not to be regarded as at all in conflict with the remark of Van Ness, J. in the same case, who said: "The true and only inquiry is, has the conduct of the defendant occasioned damnum cum injuria to the plaintiff? If both have been shown, the action is maintainable." If the gist of the action be the loss of the comfort of the society of the wife, then damage with injury is fully stated and shown. more v. Greenbank, Willes, 581, it was laid down "that by injuria is meant a tortious act." This is fully charged in the present case. In Hutcheson v. Peck, supra, Thompson, J. said: "The quo animo with which the defendant acted ought to have been made the material point of inquiry." In the case before us,

the quo animo is fully alleged and admitted. In the case of Wensmore v. Greenbank, supra, which is a leading case, cited with approbation in Hutcheson v. Peck, the same objections, substantially, were made to the declaration in that case as in this, of omissions of allegations. Ch. J. WILLES said: "To be sure, it must be an unlawful procuring; but it is not necessary to set forth all the facts to show how it was unlawful." It was insisted that it was necessary to state in the complaint "that it was by false insinuations;" but the judge remarked, "that it was not material whether they were true or false; if the insinuations were true, and by means of those the defendant persuaded the plaintiff's wife to do an unlawful act, it was unlawful in the defendant." And again, he says: " Every moment that a wife continues absent from her husband (without justifiable cause), without his consent, is a new tort, and every one who persuades her to do so does a new injury, and cannot but know it." Our own courts, to their credit, have quite uniformly adopted the same high moral views of the law of public policy, in this regard, as they have in England. In Bennett v. Smith, 21 Barb. 441, T. R. Strong, J. holds this language: "The wife owes to the husband the duty of living with him, and seeking to promote his interests and happiness; and by preventing the performance of that duty, a wrong is done to him, involving a pecuniary loss, as well as a loss of peace and comfort in the marriage relation. Whoever is the wrongdoer, whether the father of the wife, or any other person, he should be subject to an action for damages by the husband." The judge who tried the action last cited charged the jury, "that if the defendant, by persuasion or force, prevented the plaintiff's wife from returning to her husband, he was liable; or if he persuaded her to stay away from her husband, such persuasion was an unlawful act; and that the law imputes an unlawful purpose to all persons who do an unlawful act; and that if the defendant had done either of these, he was liable, without reference to his motives or intentions." The general term of the seventh district hold this charge to be sound. Such an injury is analogous to, and differs only in degree from, an injury to a husband by criminal conversation with the wife. In each case, it is alienating the wife's affections from her husband, and destroying the comfort he enjoyed in her society. (Id. 446.) So in the case of Schuneman v. Palmer, 4 Barb. 227, HARRIS, J. laid down the

rule: "The husband has the right to the society and assistance of his wife, and whoever persuades or entices her to separate herself from him, and thus deprive him of that right, is liable to an action." And again: "Whenever a wife is unjustifiable in abandoning her husband, he who knowingly and intentionally assists her in thus violating her duty is guilty of a wrong, for which an action will lie." This principle was repeated in Barnes v. Allen, 30 Barb. 663.

The case before us differs from the cases cited, not in principle, but only in the fact that there was no actual departure of the wife from the husband's house in the case before us. But how does this fact change the case, or the principle to be determined by it? The injury in either case is the same, upon the authority above cited. I am not sure that the wrong and injury is not aggravated by the fact that the wife still remains in the house of the husband. Here was the same poisoning of her mind; the same alienation of affections from the husband; the same refusal to receive or acknowledge him as a husband and to live with him as such; the same refusal to give him comfort, fellowship, and society; the same refusal of her aid and assistance in his domestic affairs, all that constitutes the gist of the action, — and all equally induced by the unlawful act and advice of the defendant. Her actual presence in his house and with him, under such circumstances, maintaining and exhibiting towards him such feeling, could afford him no relief from the injury inflicted, but would rather add the provocation of insult to the keenness of suffering. It would continue before him a present, living, irritating, aggravating, if not consuming source of grief, which even her absence might in a measure relieve. At all events, it would relieve him from the burden of her support, if she were absent. It is laid down by Bishop, in his work on Marriage and Divorce, §§ 777, 781, 782, 799, that the refusal of the husband or wife to dwell with the other party to the marriage, as husband or wife, is desertion. The same authorities hold that there may be desertion though the parties continue to occupy the same house. 1 Bishop on Marriage and Divorce, § 779. 2 Little, (Ky.) 337. Moss v. Moss, 2 Iredell, (N. C.) 35.

How is desertion, then, to be distinguished from separation?

What reason can be given that should make it material that there be a technical physical separation of the parties, in order to con-

stitute a cause of action? I apprehend that the separation which occasions the real injury, the suffering, the loss, is based upon a higher principle; it is one that strikes at the source of the highest enjoyments of life; it is alienated affections, the loss of comfort, of fellowship, society, aid, and assistance in domestic affairs; the loss of conjugal rights. "It may be laid down as a rule," says Bishop, "that if one party refuse to the other whatever belongs to marriage alone, from causes resting in the will, and not from physical inability, the refusing party would thereby voluntarily withdraw from whatever the relation of marriage, distinguished from any other relation existing between human beings, is understood to imply; therefore he should be holden to desert thereby the other." § 782.

The law affecting this relation, I am disposed to say, should be administered and held in all its fidelity and integrity; the courts at least should see to it that the reproach should not be cast upon them, that he who commits an injury, such as that complained of in this case, should not be permitted to escape the consequences of his act, upon a frivolous and immaterial technicality.

The order of the special term should be affirmed.

BENNETT v. BENNETT.

(116 N. Y. 584. Court of Appeals [Second Div.] of New York, 1889.)

Wife's Action for Enticement of Husband.

Vann, J. The plaintiff, a married woman, brought this action to recover damages from the defendant for enticing away her husband, and depriving her of his comfort, aid, protection, and society. The defendant insists that neither at common law nor under the act concerning the rights and liabilities of husband and wife can such an action be maintained. It was provided by that statute that any married woman might, while married, sue and be sued in all matters having relation to her sole and separate property, and that she might maintain an action in her own name, for damages, against any person or body corporate, for any injury to her person or character, the same as if she were sole. Laws

of 1860, chap. 90, p. 158, § 7, as amended by chap. 172, Laws of 1862, p. 343. An injury to the person, within the meaning of the law, includes certain acts which do not involve physical contact with the person injured. Thus criminal conversation with the wife has long been held to be a personal injury to the husband. Delamater v. Russell, 4 How. 234; Straus v. Schwarzwaelden, 4 Bosw. 627. And the seduction of a daughter a like injury to the father. Taylor v. North, 3 Code Rep. 9; Steinberg v. Lasker, 50 How. 432. The Code of Civil Procedure, in defining "personal injury," includes under that head libel, slander, "or other actionable injury to the person." § 3343, sub. 9.

It is well settled that a husband can maintain an action against a third person for enticing away his wife and depriving him of her comfort, aid, and society. Hutcheson v. Peck, 5 Johns. 196; Barnes v. Allen, 1 Abb. Ct. Ap. Dec. 111. The basis of the action is the loss of consortium, or the right of the husband to the conjugal society of his wife. It is not necessary that there should be proof of any pecuniary loss in order to sustain the action. Hermance v. James, 32 How. 142; Rinehart v. Bills, 82 Mo. 534. Loss of services is not essential, but is merely matter of aggravation, and need not be alleged or proved. Bigaouette v. Paulet, 134 Mass. 125.

According to the following cases, a wife can maintain an action in her own name and for her own benefit against one who entices her husband from her, alienates his affection, and deprives her of his society: Jaynes v. Jaynes, 39 Hun, 40; Breiman v. Paasch, 7 Abb. N. C. 249; Baker v. Baker, 16 id. 293; Warner v. Miller, 17 id. 221; Churchill v. Lewis, id. 226; Simmons v. Simmons, 21 id. 469.

There appears to be no reported decision in this State holding that such an action will not lie, except Van Arnum v. Ayers, 67 Barb. 544. That case was decided at Special Term in 1877, and the learned justice who wrote the opinion therein, as a member of the General Term when the case now under consideration was affirmed, concurred in the result, and stated that, owing to recent authorities, he thought the right of action should be upheld. Some of the cases rest mainly upon the statute already alluded to, and sustain the action upon the theory that enticing away the wife is such an injury to the personal rights of the husband as to amount to an injury to the person, while others proceed upon the

ground that the loss of consortium is an injury to property in the broad sense of that word, "which includes things not tangible or visible, and applies to whatever is exclusively one's own." Jaynes v. Jaynes, supra, sustains the action upon either ground, although prominence is given to the latter. Several of the cases justify the action generally without allusion to any statute. If the wrong in question is an injury to property simply, it would not abate upon the death of the plaintiff, but could be revived in the name of the personal representatives, a consequence which suggests the precarious nature of that basis for the action. Cregin v. Brooklyn Crosstown R. R. Co., 75 N. Y. 192; 83 id. 595.

In other States the rule varies. In Ohio and Kansas recovery by the wife is permitted, while in Indiana the right thus far has been denied, but by a court so evenly divided in opinion as to leave the ultimate rule in that State uncertain. Clark v. Harlan, 1 Cin. 418; Westlake v. Westlake, 34 Ohio St. 621; Mehrhoff v. Mehrhoff, 26 Fed. Rep. 13; Logan v. Logan, 77 Ind. 558. In England the point does not appear to have been directly passed upon, but in one case the judges approached it so nearly and differed so widely in their discussions that it is cited as an authority upon both sides of the question. Lynch v. Knight, 9 H. L. 577. The Lord Chancellor (CAMPBELL), in delivering the leading opinion, said: "If it can be shown that there is presented to us a concurrence of loss and injury from the act complained of, we are bound to say that this action lies. Nor can I allow that the loss of consortium, or conjugal society, can give a cause of action to the husband alone." Lord Cranworth was strongly inclined to think that this view was correct, but did not feel called upon to express a decided opinion, as it was agreed that the judgment of the court should be placed upon another ground. Lords Brougham and Wensleydale thought that the action would not lie. In that case, it is to be observed, the husband joined the wife in bringing the action "for conformity," as there was no enabling statute authorizing her to sue in her own name.

While this action was tried, decided at the General Term and argued in this court upon the theory that the acts of 1860 and 1862 concerning the rights and liabilities of husband and wife were still in force, in fact they have no application, because the sections heretofore regarded as applicable were repealed by

the general repealing act of 1880. Laws of 1880, chap. 245, §§ 36, 38.

The judgment in this action, therefore, cannot be affirmed upon the ground that the wrong complained of may be redressed under those statutes. Can it be sustained upon the theory that the right of action belongs to the wife according to the general principles of the common law, and that she may now maintain it, being permitted to sue in her own name? The Code of Civil Procedure (§ 450) provides that a married woman "appears, prosecutes, or defends, in an action or special proceeding, alone or joined with other parties as if she were single." The capacity of the plaintiff to sue cannot be questioned under this statute, but whether she has a cause of action to sue upon is the important inquiry. Can she maintain an action for any personal injury, even for an assault and battery, since the repealing act, already cited, went into effect? Admitting her power to assert her rights in court, what right has she to assert? Has she such a legal right to the conjugal society of her husband as to enable her to recover against one who wrongfully deprives her of that right?

It is urged that the novelty of the action is a strong argument that it cannot be upheld. The same point was urged in almost the first action brought by a husband against one who had enticed away his wife, and the answer made by the Court in that case we repeat as applicable to this: "The first general objection is, that there is no precedent of any such action as this, and that therefore it will not lie. But this general rule is not applicable to the present case. It would be if there had been no special action on the case before. A special action on the case was introduced for this reason, that the law will never suffer an injury and a damage without a remedy, but there must be new facts in every special action on the case." Winsmore v. Greenbank, Willes, 577, 580.

Moreover, the absence of strictly common-law precedents is not surprising, because the wife could not bring an action alone, owing to the disability caused by coverture, and the husband would not be apt to sue, as by that act he would confess that he had done wrong in leaving his wife.

The actual injury to the wife from the loss of consortium, which is the basis of the action, is the same as the actual injury

to the husband from that cause. His right to the conjugal society of his wife is no greater than her right to the conjugal society of her husband. Marriage gives to each the same rights in that regard. Each is entitled to the comfort, companionship, and affection of the other. The rights of the one and the obligations of the other spring from the marriage contract, are mutual in character, and attach to the husband as husband and to the wife as wife. Any interference with these rights, whether of the husband or of the wife, is a violation not only of a natural right, but also of a legal right arising out of the marriage relation. It is a wrongful interference with that which the law both confers and protects. A remedy not provided by statute, but springing from the flexibility of the common law and its adaptability to the changing nature of human affairs, has long existed for the redress of the wrongs of the husband. As the wrongs of the wife are the same in principle, and are caused by acts of the same nature as those of the husband, the remedy should be the same. reason is there for any distinction? Is there not the same concurrence of loss and injury in the one case as in the other? Why should he have a right of action for the loss of her society, unless she also has a right of action for the loss of his society? Does not the principle that "the law will never suffer an injury and a damage without a remedy" apply with equal force to either case? Since her society has a value to him capable of admeasurement in damages, why is his society of no legal value to her? Does not she need the protection of the law in this respect at least as much as he does? Will the law give its aid to him and withhold it from her?

It appears from the cases already cited that, according to the weight of authority, the wife can maintain such an action when there is a statute enabling her to sue. The modern elementary writers take the same position. "To entice away or corrupt the mind and affection of one's consort is a civil wrong, for which the offender is liable to the injured husband or wife. The gist of the action is not the loss of assistance, but the loss of consortium of the wife or husband, under which term are usually included the person's affection, society, or aid." Bigelow on Torts, 153. "We see no reason why such an action cannot be supported where, by statute, the wife is allowed to sue for personal wrongs suffered by her." Cooley on Torts, 227.

The question remains whether a married woman can now maintain an action in this State for an injury to her person? Had a married woman a right of action at common law for a personal injury, but without power to assert it, owing to her coverture, or did the right itself belong to the husband? If the right was his, she seems to have no remedy for such wrongs since the repeal of the statutes of 1860 and 1862. If, however, the right was hers, but, owing to the legal fiction of the unity of husband and wife, she could not assert it, she may now have a remedy under section 450 of the Code.

At common law the husband and the wife were treated as one person, and marriage operated as a suspension, in most respects, of the legal existence of the latter. From this supposed unity of husband and wife sprang all the disabilities of married women. She could not make a binding contract, or commence an action, because either would imply that she had a separate existence. He could not enter into a covenant with her, because it would be only a covenant with himself. They could not give evidence for each other, because no one was then permitted to testify in his own behalf, nor against each other, because no one could be compelled to accuse himself. marriage only suspended her personal rights, it did not annihilate them nor transfer them all absolutely to her husband. While it was an absolute gift to him of her goods and chattels, it was only a qualified gift to him of her choses in action, depending upon the condition that he reduce them to possession during coverture, as otherwise upon his death they belonged to Bright's Husband and Wife, vol. i. pp. 34, 36; Clancy on Women, 109; Reeves's Domestic Relations, (4th ed.) 1; 2 Kent's Com. (11th ed.) 116.

"It is common doctrine upon which the decisions in all the States of our Union and of England are in harmony, that, on the death of the husband, the wife's choses in action not reduced by him to possession survive to her. She takes them, not as his heir, personal representative, or administratrix, but they revert to her in her own right. And we have seen that this doctrine applies as well to the wife's post-nuptial choses in action as to her ante-nuptial ones." Bishop's Married Women, § 171. "The husband shall not have them unless he and his wife recover them." Co. on Lit. 351, b.

Under the head of choses in action, torts committed upon a married woman, either before or during coverture, are included. "Although the husband is . . . entitled to all the property which the wife acquires during the coverture, yet, if damages be claimed for an injury to her person or reputation during her coverture, those damages belong to her, and she must be joined with the husband in the suit. When damages for such an injury are collected they belong to the husband, but in case of his death before they are reduced to possession they survive to the wife, in the same manner as if the injury had been received before marriage." Reeves's Dom. Rel. 87.

"The wife has capacity to be a recipient of wrong as well as of property, the same as though she were sole. If she is slandered, or an assault and battery is committed upon her, or any trespass or other actionable wrong, she may, on becoming discovert, sue the wrongdoer the same as though she had been sole when she received the injury; though, if the suit is brought in the lifetime of her husband, he must be made a party plaintiff with her, in consequence of the general rule of law which places the wife under the protection of her husband. When the result of the wrong becomes money, in the form of damages paid by the wrongdoer, the wife, though she can receive, cannot hold it, and the title glides to the husband, making the money his." on Mar. Wom. § 705. The authorities are uniform in supporting the position of these writers. Latourette v. Williams, 1 Barb. 9; Klein v. Hentz, 2 Duer, 633; Ball v. Bullard, 52 Barb. 142; Beach v. Ranney, 2 Hill, 309; Smith v. Scudder, 11 S. & R. 325; Checchi v. Powell, 6 B. & C. 253; Bond v. Simmons, 3 Atk. 20.

The cause of action for a personal injury to a married woman, whether committed before or after marriage, belonged to her at common law, or else it would not survive to her upon the death of her husband. If it was his, it would either abate or pass to his personal representatives. On the other hand, if she dies, as Lord Bacon said, "The action dies with her." Bacon's Abr., Baron and Feme, K. Unless the right was hers, subject only to the disability to sue without her husband, why should it cease upon her death? Why should it not survive to the husband if the right itself was his? So, in the case of an absolute divorce, such rights of action remain the property of the wife. Legg v. Legg, 8 Mass. 99; Lodge v. Hamilton, 2 S. & R. 491.

If the injury was to the wife only, the action was brought in the name of both husband and wife, and was, in effect, her action. If the injury was in part to her and in part to him, for the former both joined, but for the latter he sued alone. Johnson v. Dicken, 25 Mo. 580; Hooper v. Haskell, 56 Me. 251; Laughlin v. Eaton, 54 id. 156.

It is clear, therefore, that at common law the right of action for a tort committed upon a married woman belonged to her, and it is in the light of this principle that the full significance of section 450 of the Code becomes apparent. This section recognizes the separate existence of the wife to the broad extent of authorizing her to sue generally in her own name. By enabling her to prosecute as if she were single, it removed the only obstacle in the way of a personal assertion of her right in this regard. She had a right of action for any actionable injury before, but she could not set the law in motion unless her husband joined. When the legislature provided that she could sue in her own name, without this inconvenient formality, it cut off the right of the husband, and permitted her to prosecute and recover for herself.

This view is confirmed by considering the history of legislation in relation to married women since 1848. Did the legislature suppose that, in repealing the sections in question of the acts of 1860 and 1862, they were restoring the rule of the common law, and were depriving married women of substantial rights? Endlich's Interpretation of Statutes, § 475.

Every step in legislation, unless this is an exception, has been in the direction of the complete abrogation of the common-law unity of husband and wife. No step backward has been taken in that regard, unless this must be construed to be such.

The bar, the public, and the courts have thus far all proceeded upon the theory that a married woman can still sue in her own name and for her own benefit for any injury to her person. It is a matter of common knowledge, that, since the repealing act of 1880, in nearly every county of the State such actions have repeatedly been brought and tried, recoveries had and paid, and other actions brought that are now pending, upon the theory, adopted by both parties, that the right of a married woman to sue for personal injuries still exists. Even the exhaustive brief of the learned counsel for the appellant contains no suggestion

to the contrary. This practical construction by the bar, the public, the legislature, and the courts is of great value, because a contemporaneous is generally the best construction of a statute. Sedgwick on Stat. and Con. Law, 227.

The disastrous consequences that would result from the opposite construction cannot be lost sight of, because for nearly nine years the people have conducted their business, the lawyers have advised their clients, and the courts have administered justice, without exception, so far as known, in unquestioned reliance upon the unchanged rights of married women with reference to torts committed upon them. If such a radical change was effected by the repealing act, why was it not sooner discovered? By section 1906 of the Code of Civil Procedure, an action for slander by the use of words imputing unchastity can be maintained by a woman without proof of special damage, and, "if the plaintiff is married, the damages recovered are her separate property."

Was this section left simply as a landmark to show how far the tide of legislation had gone in the direction of emancipating married women before it began to flow back toward the old level of the common law? Is it not rather part of a harmonious system, designed to permit married women to seek redress in their own names and for their own benefit for any violation of their rights, whether of person or property? According to the Code of Procedure, when a married woman was a party, her husband was a necessary party with her, unless the action concerned her separate property, or it was between herself and husband. Code Proc. § 114; Laws of 1849, chap. 438, § 114. It was not by virtue of that Code, but owing to the acts of 1860 and 1862, that a married woman could sue for personal injuries.

From 1849 until 1877, section 114 of the old Code remained unchanged in this respect. When section 450 of the new Code was enacted, it was a substitute for section 114, and the revisers, in reporting the new section said: "It is believed that no argument is necessary in support of the proposition that what is left of that section by the various married women's acts should be swept away."

The object of the repealing act of 1880, as well as that of its precursor of 1877, as is evident from an attentive study of their provisions, was to do away with statutes and parts of statutes

regarded as obsolete. Laws of 1877, chap. 417; Laws of 1880, chap. 245.

Owing to the enactment of the Code of Civil Procedure and other statutes revising and changing existing laws without repealing or referring to them, the legislature sought to repeal statutes and sections no longer regarded as operative. Its intention was to formally do away with that which had already been practically done away with, rather than to make further changes. If the legislature had intended to make a radical alteration in its long established policy of legislation affecting the rights of married women, it would not ordinarily be buried in the midst of an act designed to erase useless provisions from the statute-book. One would not expect that such a decided change, affecting nearly every family in the State, would be so obscurely made.

These views are not in conflict with Fitzgerald v. Quann, 109 N. Y. 441, which holds that in an action against the wife for a tort committed by her, as the husband is still liable, he is a proper party defendant.

At common law the husband was liable for the torts of his wife, whereas her choses in action, including the right to recover for torts inflicted upon her, never vested in him, although he was entitled to the proceeds when collected. As a party plaintiff, therefore, he was joined "for conformity," but it was "more than a mere necessity to join him as a party defendant." Fitzgerald v. Quann, 33 Hun, 657, 658. His joinder in the one case was a mere formality, while in the other it was on account of his liability. While he had no cause of action in the former, there was a cause of action against him in the latter.

We regard the language of section 450, when construed in connection with the common-law rules already alluded to, as strong enough to relieve a married woman of the formality of having her husband unite with her in bringing an action for an injury inflicted upon her, but not strong enough to relieve him of his absolute liability.

We think the judgment appealed from should be affirmed, upon the ground that the common law gave the plaintiff a right of action, and that the Code gave her an appropriate remedy.

BRADLEY, J. The embarrassment which seems to attend the disposition of this case arises from the repeal by Laws of 1880, chapter 245, section 1, subdivisions 36, 38, of the amendatory

section 3, chapter 172, Laws of 1862, and the amended section 7, chapter 90, Laws of 1860, which provided that a married woman might maintain an action in her own name to recover damages for injuries to her person or character, and that the proceeds of the recovery should be her property. The remaining statutes, which enable her to prosecute an action in her own name alone also, provide that it shall be neither necessary or proper to join her husband as a party with her in any action affecting her separate property. Code, § 450. This action is founded upon the disregard of the duties of the marital relation by the husband of the plaintiff, induced by the defendant, to the prejudice of the plaintiff. Marriage is a civil contract. 2 R. S. 138, § 1; Clayton v. Wardell, 4 N. Y. 230. From such contract spring reciprocal duties of the parties to it, amongst which are those assumed by the husband, of her maintenance and his consortium, and thus to contribute to her comfort and enjoyment. To these means of her happiness, so far as practicable, she is entitled. As appeared by the verdict of the jury, the plaintiff's husband was induced by the defendant to essentially refuse to perform his marital undertaking, or to regard her rights in that respect. And the damages arising from the denial to the plaintiffs of such rights result from a breach by the husband, so induced, of the contractual relation of marriage. But such contract is sui generis, and differs from all other contracts in so far that the nature of a recovery of damages in an action founded upon its breach is as in tort, and the action is deemed as for a personal injury, and consequently does not survive the party injured. Thorn v. Knapp, 42 N. Y. 474; Wade v. Kalbsleisch, 58 id. 282. And while a right of action for a personal injury may not be within the definition, as frequently given, of a chose in action, that term in its broadest sense does embrace it. People v. Tioga C. P., 19 Wend. 73, 74; Berger v. Jacobs, 21 Mich. 215; C., B. & Q. R. R. Co. v. Dunn, 52 Ill. 260; 4 Am. R. 606; 3 Am. and Eng. Encyl. of Law, tit. Chose in Action.

I concur in the result of the opinion of Judge Vann, and in his view that a cause of action arises against a party who effectually and wrongfully entices a husband to abandon his wife, and that at common law its availability to her was denied by reason of the disability of the wife to seek redress by action or take the benefit of it. The case involves the misconduct of the husband, and there

is no propriety in permitting him to join with his wife in prosecuting an action for such cause, and to realize a pecuniary benefit as the result of his own wrong. The cause of action is the wrongful deprivation of the plaintiff of that to which she is entitled by virtue of the marital relation. It arises from the denial to her of that which the marriage contract gave her, and which she, unmolested, had the right to have and enjoy. The conjugal society of the parties to it is an essential requirement of such a contract and relation. And when that due from the husband is wrongfully taken from her, the consequences are her loss and hers alone. The plaintiff's right to the chose in action, springing from the defendant's act, which produced such loss to her, was derived from the marriage contract. It belonged to her, was her property. And since she is permitted, by statute, to have and assert proprietary rights, independently of her husband, and as provided by the section of the Code before mentioned, to alone and for her benefit prosecute actions, there seems to be nothing in the way of the plaintiff's right to maintain this action.

The judgment should be affirmed.

All concur except HAIGHT and PARKER, JJ., dissenting, and FOLLETT, Ch. J., not sitting.

Judgment affirmed.

WEEDON v. TIMBRELL.

(5 Term Reports. Court of King's Bench, 1793.)

Husband's Action for Crim. Con.

In an action for criminal conversation with the plaintiff's wife, it appeared that the plaintiff and his wife had agreed to live separately: subsequent to their separation, the plaintiff proved several acts of adultery committed by the defendant; but there was no direct proof of any act of adultery before the separation; though it appeared that, in a conversation concerning the separation, the plaintiff had alleged in the presence of the defendant several instances of gross indecency between the latter and the plaintiff's wife, to which he had made no reply. Lord Kenyon, being of opinion at the trial, at the last Sittings

at Guildhall, that the gist of the action was the loss of the comfort and society of the wife, which was alleged in the declaration in the usual form, and that, as there was no evidence of the act of adultery till after the plaintiff and his wife were separated, proof of the act afterwards would not support that allegation, nonsuited the plaintiff.

Garrow obtained a rule to shew cause why there should not be a new trial on two grounds: first, That the evidence of loose conduct previous to the separation, coupled with the actual proof of adultery afterwards, ought to have been left to the jury as evidence of the act committed before such separation. 2dly, That the gist of the action was the act of criminal conversation; and consequently that the separation did not take away the cause of action, however it might operate in mitigation of damages.

When the cause came on again upon the report, Lord Kenyon observed that the first point could hardly arise in this case, because there was no actual evidence of the immoral or indecent conduct of the wife with the defendant before the separation, but merely an assertion of the husband to that effect, which had not been admitted by the defendant. This he said was so doubtful that it ought not to be pressed. And accordingly, on this intimation, the plaintiff's counsel did not insist any further upon that point.

Erskine showed cause on the second ground. The nonsuit was proper, because the plaintiff failed in making out the gist of the action, which is the loss of the comfort and society of the wife, of which the defendant could not be said to have deprived the plaintiff, inasmuch as the latter had, before any act of debauchery, voluntarily renounced that society. It cannot be contended that the assault upon the person of the wife is the gist of the action, and that the rest is mere matter of aggravation; for if that were so, the husband could not maintain the action in his own name only, but must also have joined his wife. In actions of a similar nature, where a father brings an action for seducing his daughter, per quod servitium amisit, the per quod is the gist of the action; and the action cannot be maintained if she be living apart from the father at the time. Here the husband had abandoned all his marital rights over the person of his wife, and could not have

¹ Satterthwaite v. Dewhurst, E. 25 G. 3, B. R., and Postlethwaite v. Parkes, 8 Burr. 1878.

reclaimed her without her own consent. With respect to a case, which was mentioned at the trial, of Warrington v. Brown, Sittings at Guildhall after Trin. 1779, before Lord Mansfield, in which the plaintiff, who had brought an action after the separation from his wife, obtained a verdict; it is to be observed that it did not appear but that the act of adultery was before the separation; and Lord Mansfield under all the circumstances of the case summed up against the plaintiff.

Garrow, Shepherd, and Reader, contra. The gist of the action is the criminal act, and not the loss of comfort, etc.; if it were otherwise, parties ought to be let into evidence to show, in bar of the action, that no comfort was lost; which has never been allowed. It will be a very impolitic principle, and greatly conducive to immorality, to declare, that not the criminal act, but the loss of comfort, is the gist of the action. If that were so, no such action can be maintained for adultery after any separation, on whatever account it may have taken place. If it be for disagreement of temper, for example, it is not unlikely that a reconciliation may take place, against which a subsequent act of adultery will be an effectual bar. By this too a spurious issue may be thrown upon the busband; and though he or his representatives may disprove the access, yet the onus probandi lies upom them. The admission of the principle contended for will also lead to nice distinctions of immorality, which are ever to be avoided. Supposing the act of adultery committed before separation, but not known to the husband till afterwards, it may as well be contended, in defence to such an action, that the loss of comfort does not arise from the act of adultery, which in such case would be Suppose a separation by the husband's being in a literally true. different country, could it be contended that no action was maintainable, because he could not suffer any present loss of comfort; or if the separation were premeditated only for a certain time, at the end of which the parties proposed to live together again, would that defeat this action? If not, why may it not equally be supposed that the parties may at some future time be reconciled, although their separation was at first for an indefinite time? It has no doubt been customary to lay the loss of comfort, etc., in declarations of this nature; but that has never been held necessary; and if it were necessary to be laid, it does not follow that

¹ See R. v. M. Mead, 1 Burr. 542.

it is necessary to be proved. In the case of a father who brings an action for the debauching of his daughter, although it may be necessary to lay it with a per quod servitium amisit, yet substantially no such proof is necessary. There is, besides, another inconvenience attending the principle contended for on the other side; for if that be true, no man who is separated from his wife, on whatever account, can ever obtain a divorce on account of any act of adultery afterwards; as it has generally been required of persons seeking a divorce to show the verdict of a jury in their behalf. [Lord Kenyon, Ch. J. But such a verdiet is not essentially necessary; otherwise no divorce could be obtained if the adulterer died before the action was brought.] The plaintiff's counsel also read a note of the case of Warrington v. Brown, different from that mentioned on the other side. This was stated to be an action for criminal conversation, brought by the husband after a total separation from his wife, though no articles were executed. The note stated that the plaintiff had recovered a verdict about a year before, which was also after the separation, on the same account, against the defendant; and that this action was for a repetition of the offence; and that the jury, under the direction of Lord Mansfield, found for the plaintiff. There the declaration alleged the loss of comfort and society, etc., and the damages were 201.; a writ of error was brought, but the judgment was affirmed; and no new trial was ever moved for.

Lord Kenyon, Ch. J. On the trial of this cause, I understood there was no decision on the subject; on principle, I thought that the action would not lie, and nonsuited the plaintiff. If the case before Lord Mansfield had been decided in the manner now supposed, it would have had very considerable weight with me: but, according to a note of that case, with which I have been furnished, it appears that his Lordship's opinion was against the action; for he said it was a new experiment; that permitting such an action to be maintained would be attended with very mischievous consequences; and that the gist of the action was the loss of the comfort and society of the plaintiff's wife. true that the jury gave a verdict for the plaintiff with 201. damages: but that was certainly against the opinion of the judge; perhaps the smallness of the damages, and the improper conduct of the defendant, in that case, were the reasons why no motion was made for a new trial. It is material to consider what is the gist

of this action; the plaintiff contends that it is the criminal act, but that I deny. I think it is a civil action, brought to recover satisfaction for a civil injury done to the husband, and not to punish the defendant for having broken the laws of morality and decency. But what injury is done to the plaintiff, who has voluntarily relinquished his wife? It cannot be said that he is deprived of the comfort and society of his wife. I can see the immorality of the defendant's conduct in as strong a light as any person; but still this action must be confined within legal This is like the case of an action by a father for the loss of service of his child; in which, however the parent may feel for the violation of his daughter's chastity, it is clear that no action can be maintained, unless some evidence be given that the daughter performed some acts of service for the father. This is not like the instance put of a temporary separation from the wife; in such case, the wife still continues within the protection of the husband, which she does not here. Before I saw the opinion of Lord Mansfield in the case before him, I thought that this action could not be supported; and I am now confirmed by what his Lordship there said, because that which is the gist of action fails.

ASHHURST, J. The gist of this action is the loss of the comfort and society of the plaintiff's wife: that is always inserted in declarations of this kind, as a material and substantial allegation; and the forms of pleading are evidence of the law. Then, taking that as the principle, it follows that if the husband separated himself from his wife, he cannot be said to be deprived of that comfort and society which he has before renounced. Under the circumstances of this case, it cannot be said that the plaintiff has sustained the injury which he has imputed to the defendant. And the opinion of Lord Mansfield in the case cited coincides with ours. The principle of this case is like that mentioned of debauching the plaintiff's daughter, in which the plaintiff must give some proof of acts of service done by her in order to support the allegation in the declaration; very slight evidence indeed is sufficient, but still it is necessary to give some.

BULLER, J. of the same opinion.

GROSE, J. This is considered as an action on the case, and not of trespass; and the plaintiff is entitled to full costs, though he recover less than 40s.

Rule discharged.

BIGAOUETTE v. PAULET.

(134 Mass. 123. Supreme Judicial Court of Massachusetts, 1883.)

Husband's Action for Crim. Con.

Tort in four counts. The first count was for seduction of the plaintiff's wife; the second and fourth were for assaults upon her; and the third was for a rape; whereby the plaintiff lost her comfort, assistance, society, and benefit. Writ dated April 9, 1877. Trial in the Superior Court, before ROCKWELL, J., who allowed a bill of exceptions, in substance as follows.

The only witnesses were the plaintiff and his wife. The wife testified that the plaintiff was a workman in the factory of the Smith American Organ Company, in a subordinate capacity, under the defendant, and that the parties were in the habit of visiting each other occasionally with their wives; that on some occasions, previously to July 5, 1876, the defendant told the plaintiff's wife that he would turn her husband away from the factory if she refused to receive the defendant's visits; that on July 5, 1876, the defendant violently and forcibly ravished her; that he also immediately showed her a pistol, and threatened to shoot her if she should ever tell her husband; that she was at that time four months pregnant with child; that her child was born on December 11, 1876; that on December 16, 1876, she first told her husband of what had occurred between her and the defendant, and three days afterwards the plaintiff was discharged from the factory by the defendant; that shortly after July 5, 1876, the plaintiff saw black and blue marks on his wife's arms and legs, and observed that she was ill; that she had no physician, and they kept no servant to assist her; and that she attended to and performed her ordinary domestic duties in her husband's family from the time of the assault up to the time of her confinement, but that her performance of these duties was attended with pain and difficulty to herself. The plaintiff also testified to some of the above facts, and then rested his case.

The defendant contended, the foregoing being all the material

testimony in the case, that there was not sufficient evidence of a loss of the wife's services to enable the plaintiff to maintain this action.

The judge ruled that, as there was no evidence to support the count charging the defendant with seducing the plaintiff's wife, and as the evidence applicable to the counts for assault and rape proved that no loss of service was caused to the plaintiff, the action could not be maintained; and directed a verdict for the defendant. The plaintiff alleged exceptions.

The case was argued at the bar, in November, 1878, by A. Russ & H. B. Sargent, Jr., for the plaintiff, and by W. P. Harding, for the defendant; and was afterwards submitted on briefs by the same counsel.

W. Allen, J. The plaintiff cannot maintain this action for an injury to the wife only; he must prove that some right of his own in the person or conduct of his wife has been violated. A husband is not the master of his wife, and can maintain no action for the loss of her services as his servant. His interest is expressed by the word consortium, — the right to the conjugal fellowship of the wife, to her company, co-operation, and aid in every conjugal rela-Some acts of a stranger to a wife are of themselves invasions of the husband's right, and necessarily injurious to him; others may or may not injure him, according to their consequences, and, in such cases, the injurious consequences must be proved, and it must be shown that the husband actually lost the company and assistance of the wife. This is illustrated in the statement of injuries to a husband in 3 Bl. Com. 139, 140, where such injuries are said to be principally three: "abduction, or taking away a man's wife; adultery, or criminal conversation with her; and beating or otherwise abusing her." The first two are of themselves wrongs to the husband, and his remedy is by action of trespass vi et armis. In regard to the others, the author's words are: "If it be a common assault, battery, or imprisonment, the law gives the usual remedy to recover damages, by action of trespass vi et armis, which must be brought in the names of the husband and wife jointly: but if the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of the wife, the law then gives him a separate remedy by an action of trespass, in nature of an action upon the case, for this ill usage, per quod

consortium amisit; in which he shall recover a satisfaction in damages." He states, as one of the circumstances affecting the damages in an action for adultery, "the seduction or otherwise of the wife, founded on her previous behavior and character."

It is usual in actions for criminal conversation to allege the seduction of the wife, and the consequent alienation of her affections, and loss of her company and assistance, and sometimes of her services; but these are matter of aggravation, except so far as they are the statement of a legal inference from the fact itself, and actual proof of them is not necessary to the husband's right of action. The loss of the consortium is presumed, although the wife may have herself been the seducer, or may not have been living with the husband. A husband who is living apart from his wife, if he has not renounced his marital rights, can maintain the action, and it is not necessary for him to prove alienation of the wife's affection, or actual loss of her society and assistance. See Chambers v. Caulfield, 6 East, 244; Wilton v. Webster, 7 C. & P. 198; Yundt v. Hartrunft, 41 Ill. 9. The essential injury to the husband consists in the defilement of the marriage bed, - in the invasion of his exclusive right to marital intercourse with his wife, and to beget his own children. This presumes the loss of the consortium with his wife, of comfort in her society in that respect in which his right is peculiar and exclusive. Although actions of this nature have generally been brought where the alienation of the wife's affections, and actual deprivation of her society and assistance, have been the prominent injury to the husband, yet it is plain that the seduction of the wife, inducing her to violate her conjugal duties, and the injuries arising from that, are not the foundation of the action. The original and approved form of action is trespass vi et armis, and though this form was adopted when the act was with the consent of the wife, it was for the reason, as given by Chief Justice Holt, that "the law indulges the husband with an action of assault and battery for the injury done to him, though it be with consent of his wife, because the law will not allow her a consent in such case to the prejudice of her husband, because of the interest he has in her." Rigaut v. Gallisard, 7 Mod. 78; 2 Ld. Raym. 809; Holt, 50. See also Bac. Abr. Trespass, C, 1, and Marriage, F, 2; 2 Chit. Pl. (13th Am. ed.) 855; Reeves's Dom. Rel. 63. The fact that trespass, and not case, was the form of action, even when the wrong was accomplished by the seduction of the wife, for the reason that the wife was deemed incapable of consent, and "force and violence were supposed in law to accompany this atrocious injury," indicates that the cause of action arose from acts committed upon the person of the wife, and not from influences exerted upon her mind, — that the corrupting of the body rather than the mind of the wife was the original and essential wrong to the husband.

We think that this action may be maintained upon the evidence offered, not for the actual loss of comfort, assistance, society, and benefit, alleged in the second and fourth counts as consequences of the assaults set forth in them, but for the loss of the consortium with the wife which is implied from criminal conversation with her whether with or against her will.

Exceptions sustained

GUY v. LIVESEY.

(2 Cro. Jac. 501. Court of King's Bench, 1618.)

Husband's Action for Damages in Consequence of Assault and Battery to Wife.

TRESPASS of Assault and Battery: For that the defendant did assault, beat, and wound the plaintiff; nec non for that he assaulted and beat the wife of the plaintiff, per quod consortium uxoris suce for three days amisit: The defendant pleaded Not guilty, and it was found against him in both, and damages assessed to 801. (it being in truth a great battery to the Baron), and the damages given, for that the plaintiff's wife went with the defendant and lived with him in suspicious manner. And it was now moved in arrest of judgment that the Baron ought not to join the battery of his Feme with the battery which was done unto himself; and he cannot have an action for the battery of his Feme, but ought to join his Feme with him in the action; for the damage done to the Feme, she ought to have (if she survive her husband); and so the defendant may be twice punished for one and the same battery, if the plaintiff here should recover; for this recovery of the Barons shall not bar her of bringing her action, if she survive him; wherefore if the Baron will bring the action, he ought to have joined his Feme with him. But all the Court held that the action was well brought; for the action is not brought in respect

of the harm done to the Feme, but it is brought for the particular loss of the husbands, for that he lost the company of his wife, which is only a damage and loss to himself, for which he shall have this action, as the master shall have for the loss of his servants service; and a precedent was shown in 28 Eliz. Rot. in this Court, where one Cholmley brought an action for the battery of his Feme, per quod negotia sua infecta nemanserunt; and had judgment to recover. And another precedent was cited to be in the Exchequer in Doylies case, that such an action was adjudged good. Wherefore it was adjudged here that the plaintiff should recover.

BAKER v. BOLTON:

(1 Camp. 498. Court of King's Bench at Nisi Prius, 1808.)

Husband's Action for Damages in Consequence of Personal Injuries to Wife, eausing her Death.

This was an action against the defendants as proprietors of a stage-coach, on the top of which the plaintiff and his late wife were travelling from Portsmouth to London, when it was overturned; whereby the plaintiff himself was much bruised, and his wife was so severely hurt that she died about a month after in a hospital. The declaration, besides other special damage, stated, that "by means of the premises, the plaintiff had wholly lost, and been deprived of the comfort, fellowship, and assistance of his said wife, and had from thence hitherto suffered and undergone great grief, vexation, and anguish of mind."

It appeared that the plaintiff was much attached to his deceased wife, and that, being a publican, she had been of great use to him in conducting his business. But,

Lord Ellenborough said, the jury could only take into consideration the bruises which the plaintiff had himself sustained, and the loss of his wife's society, and the distress of mind he had suffered on her account, from the time of the accident till the moment of her dissolution. In a civil court, the death of a human being could not be complained of as an injury; and in this case the damages as to the plaintiff's wife must stop with the period of her existence.

Verdict for the plaintiff, with 100l. damages.

CAPEL v. POWELL.

(17 C. B. M. S. 748. Court of Common Pleas, 1864.)

Husband's Liability for Wife's Tort. — After Decree for Dissolution of Marriage.

This was an action for an assault and false imprisonment.

The declaration stated that the defendant Caroline Nickel, sued as Caroline Powell, at and during the time she was the wife of the defendant Ellison Powell, unlawfully gave the plaintiff into the custody of a policeman, on a false charge of felony, etc., etc.

The defendant Caroline Nickel pleaded, first, not guilty; secondly, a justification.

The other defendant pleaded that at the time of the commencement of the action the said Caroline Nickel was not his wife.

The plaintiff new-assigned that the trespasses complained of were committed by the said Caroline Nickel whilst she was the wife of the said Ellison Powell.

To this the defendant Ellison Powell pleaded, that, at the time of the commencement of the action, the said Caroline Nickel was not his wife. Issue thereon.

At the trial, before Martin, B., at the last Summer Assizes at Kingston, the female defendant did not appear. It was proved on the part of the defendant Ellison Powell, that, at the time the transaction complained of took place, Caroline Nickel and himself were living apart by mutual consent, and that before the commencement of the action he had obtained a decree for dissolution of the marriage under the 20 & 21 Vict. c. 85.

The learned judge was of opinion that the plea was an answer to the action; and he desired the jury to assess the damages against the female defendant, reserving leave to the plaintiff to move to enter the verdict against the other defendant, if the Court should be of a contrary opinion.

Daly, on a former day in this term, obtained a rule calling upon the defendant Ellison Powell to show cause why judgment should not be entered against him for 50l. non obstante veredicto, on the ground that the husband's liability for the tortious act of the wife during coverture is not discharged by a decree dissolving the marriage on the ground of adultery. He referred to the 25th and 26th sections of the 20 & 21 Vict. c. 85.

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Hawkins, Q. C., and Sir G. Honyman, now showed cause. This action is not maintainable against the male defendant. In all cases where the husband is sued with his wife in respect of contracts made by her or torts committed by her before the marriage, he is merely joined for conformity: if he dies before judgment, the right of action survives as against the wife. In 1 Chitty on Pleading, ed. 1844, p. 104, it is said: "Actions for torts committed by a woman before her marriage must be brought against the husband and wife jointly. Bac. Abr., Baron and Feme (L); Co. Litt. 351 b; Com. Dig., Baron and Feme (Y). For torts committed by the wife during coverture, as for slander, assaults, etc., or for any forfeiture under a penal statute, they must also be jointly sued. 1 Hawk. P. C. 3, 4; Bac. Abr., Baron and Feme (L). A person may sue husband and wife jointly for her libel or slander, although she may have committed adultery, and they live separate, but have not been divorced a vinculo matrimonii. Head v. Briscoe, 5 C. & P. 484 (E C. L. R. vol. 24). In an action of trespass against husband and wife for her tort before coverture, or a wrong committed by her alone during the coverture, if she die before judgment, the suit will abate; but, if the husband die or become bankrupt, her liability will continue. Middleton v. Croft, Rep. temp. Hardw. 395, 399." The husband cannot after her death be sued for a tort committed by the wife. A divorce a vinculo matrimonii is for this purpose the same as death. The relation of husband and wife has in that case ceased to all intents and purposes. The 25th and 26th sections of the 20 & 21 Vict. c. 85, have been relied on to show that protection was only intended to be given to the husband quoad bygone transactions in the case of a judicial sepa-But the answer to that is obvious: it was necessary to make such a provision in the case of a judicial separation, because the relation of husband and wife still subsists, though the marital obligations are suspended; but no such provision could be needed where the marriage is altogether dissolved. In Head v. Briscoe, TINDAL, C. J. says: "There is no doubt in point of law that a husband, so long as the relation of husband and wife continues, is answerable to a third person for what is done by the wife. And, whether their separation be permanent or temporary, it does not affect the question unless it operates so upon the marriage as to make the civil relation cease; for, by the law of England, you cannot bring an action against the wife without joining the husband; and a man would be without remedy if he could not sue the husband." Here, the plaintiff is not without remedy. There is no impediment in the way of his suing the wife, who is to all intents and purposes a single woman. Head v. Briscoe came before the full court (2 Law J., N. s., C. P. 101), when the ruling of TINDAL, C. J., was sustained. This was probably the reason why the provisions contained in the 25th and 26th sections were inserted in the Divorce Act.

Daly and Houston, in support of the rule. The husband is clearly liable for the tortious acts of his wife during coverture. Bac. Abr., Baron and Feme (L). A divorce a vincule, or a sentence of dissolution of marriage, exonerates the husband from the consequences of acts done by the wife after sentence, but not before. the wife dissolves the liability, upon the principle that actio personalis moritur cum persona. The death of the wife is the act of God. Divorce is the act of the party. [ERLE, C. J. Marriage does not give a cause of action against the husband. Whilst the husband lives and the relation continues, he must be joined in all actions for his wife's debts and trespasses. If the husband dies, the action goes on against the wife. If the wife dies, the action abates, because the husband is not liable.] Before the sentence of dissolution was pronounced here, the plaintiff had a vested right of action. [Erle, C. J. Against the wife, not against the husband. The separate existence of the wife is wholly ignored during coverture. In Marshall v. Rutton, 8 T. R. 545, 548, Lord Kenyon puts the state of widowhood and divorce a vinculo matrimonii in the same category. Keating, J. — It is difficult to see any reason why the husband should be joined for conformity after the dissolution of the marriage.] When the case of Head v. Briscoe was decided, there were no means of dissolving a marriage but by an act of Parliament.

ERLE, C. J.—I am of opinion that this rule should be discharged. I think the husband who has obtained a decree of dissolution of marriage is not liable to be sued for a wrong committed by the wife whilst the coverture existed. Upon this point, the law seems to me to be perfectly clear. During coverture the wife has no such existence as to enable her to be a suitor in her own right in any court; neither can she be sued alone. For any wrong committed by her she is liable, and her husband cannot be sued without her; neither can she be sued without joining her husband. Seeing that all her personal property is vested in the husband.

band, it would be idle to sue the wife alone: the action would be fruitless. Where the husband is joined for conformity, if he dies, the action goes on against the wife; but if the wife dies, the action abates. It is clear to demonstration, therefore, that there is no cause of action against the husband. He is not liable for the wrong; but he is joined only by reason of the universal rule that the wife during coverture cannot be either a sole plaintiff or a sole defendant. The reason does not apply where there has been a divorce a vinculo matrimonii. The woman is then no longer under coverture. She is remitted to her former name and station, and is perfectly capable of suing and being sued, as if she never had been married: consequently, the necessity for joining the husband no longer exists. One can well recognize the expediency of making a legislative provision for the case of a decree of judicial separation; for, there, notwithstanding the sentence, the relation of husband and wife is not entirely dissolved. But there was no need of legislation in the case of a sentence which dissolves the marriage. Head v. Briscoe, 5 C. & P. 484, is a distinct decision of a very learned judge to that effect. By a divorce a vinculo, or a sentence of dissolution, the husband is altogether exonerated from the responsibilities which the marriage entailed upon him.

Keating, J. I am entirely of the same opinion. The moment it is established that the sole liability of the husband in respect of wrongs committed by the wife is to be joined for conformity in the action against her, it follows as a necessary consequence that the dissolution of the relation of husband and wife, by putting an end to the state of things which caused the necessity for joining him, discharges him from that liability.

Rule discharged.

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MONTAGUE v. BENEDICT.

(3 B. & C. 631. Court of King's Bench, 1825.)

Husband's Liability for Wife's Necessaries.

ASSUMPSIT for goods sold and delivered. Plea, general issue. At the trial before ABBOTT, C. J., at the Middlesex Sittings after Trinity Term, 1824, it appeared that the plaintiff was a working jeweller, and the defendant a special pleader in considerable prac-

The plaintiff, between the 20th of October and the 14th of December, 1823, had delivered to the wife of the defendant, at his house in Guilford Street, different articles of jewelry, amounting in the whole to the sum of 831., and had received from her on account 341. These things were usually delivered about twelve o'clock in the day, and plaintiff never saw any person but the defendant's wife. Upon these facts being proved, the defendant's counsel contended that the plaintiff ought to be nonsuited, because there was no evidence to show that the husband had any knowledge that the goods had been delivered to his wife, and consequently no evidence of his assent to the purchase, and Metcalfe v. Shaw, 3 Campb. 22, Waithman v. Wakefield, 1 Campb. 120, and Bentley v. Griffin, 5 Taunt. 356, were cited. The LORD CHIEF JUSTICE thought it a question for the jury whether the articles had been supplied with the assent of the husband. The defendant proved that he was married in September, 1817, and that the fortune of his wife was less than 4000l., and that she received, by virtue of her marriage settlement, for her exclusive use, a sum of 601. annually; that they inhabited a ready-furnished house in Guilford Street, at the rent of 200l. a year; that the furniture of it was not new or expensive, some of it indeed being very shabby; that the defendant kept no man-servant; that his wife, before October, 1823, had jewelry suitable to her condition, and that she had never, in her husband's presence, worn any of the articles furnished by the plaintiff. The defendant usually left his house and went to his chambers about ten o'clock in the morning, and did not return before five in the evening. When the plaintiff or his servant called at the defendant's house, they always asked for his wife, and not for him; and upon one occasion, when the clerk called in March, and stated to the female servant who opened the door, that he called for the purpose of getting settled a bill for jewelry to the amount of 801., the servant expressed her surprise that the plaintiff had trusted her mistress for such a sum, and said she was sure that her master knew nothing of it, and she swore that the clerk replied, "His master was aware of that" This, however, was denied by the clerk. The Lord Chief Justice told the jury, that a husband was not liable for goods supplied to his wife unless he gave her an express or implied authority to purchase. In considering the question of authority, the estate and degree of the parties was a fit subject for consideration, and

so also was the nature of the articles. There were some things which it might and must always be presumed the wife had authority to buy, such as provisions for the daily use of the family over which she presided; but in this case the articles were not necessary to any one; the proof was, that the husband never saw them, and the jury were to say, under these circumstances, whether the wife of the defendant had any authority from him to make a contract for the articles in question. The jury found for the plaintiff to the amount of his bill. A rule nisi had been obtained for a nonsuit, on the ground that there was no evidence to be left to the jury of the husband's assent to the contract; or for a new trial, on the ground that the verdict was against the weight of evidence.

Platt showed cause. It was a question for the jury, upon the evidence, whether the articles provided for the wife of the defendant were necessaries suitable to the degree and estate of the hus-The latter is responsible, in respect of the contracts made by the wife, for goods suitable to that condition which he suffers her to hold out to the world. It is not necessary to show an express assent of the husband to the contract, or that the articles provided were worn in his presence. If they were conformable to the apparent condition of the husband, his assent is to be presumed. Here there was abundant evidence to go to the jury, that the things provided were necessaries suitable to the degree of the husband, for it appeared that he lived in a ready-furnished house, the rent of which was 2001. per annum, and that his wife had originally a fortune of 4000l., and if they were necessaries suitable to the degree of the husband, then cohabitation was evidence of his assent to the contract made by his wife. He cited Morton v. Withy, Skinner, 348.

Scarlett and Gurney, contra. It appeared upon the trial that the plaintiff, in the course of two months, had delivered to the defendant's wife articles of jewelry amounting to 83l., and that before that time she had articles of that description suitable to her degree. The things provided by the plaintiff, therefore, were not necessaries. There was no evidence of any assent (express or implied) of the husband, to the purchase made by the wife. Cohabitation is only prima facie evidence of such assent, and here it was rebutted by the evidence given on the part of the defendant.

BAYLEY, J. It seems to me, that in this case there was no evidence to go to a jury to entitle the plaintiff to a verdict. the rule of law to be this: if a man, without any justifiable cause, turns away his wife, he is bound by any contract she may make, for necessaries suitable to her degree and estate. If the husband and wife live together, and the husband will not supply her with necessaries, or the means of obtaining them, then, although she has her remedy in the Ecclesiastical Court, yet she is still at liberty to pledge the credit of her husband for what is strictly necessary for her own support. But whenever the husband and wife are living together, and he provides her with necessaries, the husband is not bound by contracts of the wife, except where there is reasonable evidence to show that the wife has made the contract with his assent. Etherington v. Parrott, Ld. Raym. 1006. Cohabitation is presumptive evidence of the assent of the husband, but it may be rebutted by contrary evidence; and when such assent is proved, the wife is the agent of the husband duly authorized. Then the question is, was there any evidence in this case to warrant my Lord Chief Justice in submitting, as a question for the consideration of the jury, whether the wife had the authority of the husband to make this purchase? It appears that the wife had originally a fortune under 40001., that would yield an income less than 2001, per annum. There was no evidence on the part of the plaintiff to show that she had a fortune even to that extent; that fact afterwards appeared upon the defendant's evidence. Then is it to be presumed, that a husband working hard for the maintenance of himself and family, keeping no man-servant, and living in a house badly furnished, would authorize his wife to lay out, in the course of six weeks, half of her yearly income in trinkets? If the tradesman in this case had exercised a sound judgment, he must have perceived that this money would have been much better laid out in furniture for the house, than in decking the plaintiff's wife with useless ornaments, which would so ill correspond with the furniture in the house. I think, at all events, there was gross negligence on the part of the plaintiff, if he ever intended to make the husband responsible. If a tradesman is about to trust a married woman for what are not necessaries, and to an extent beyond what her station in life requires, he ought, in common prudence, to inquire of the husband if she has his consent for the order she is giving; and if he had so inquired in this case, it is not improbable that the husband might have told him not to trust her. But no such inquiry was made; on the contrary, the plaintiff always inquired for the wife, and that is strong evidence to show that she was the person trusted, and not the husband. On the whole, I think that the plaintiff did not make out, by reasonable evidence, that the wife had any authority to make the purchase in question.

HOLROYD, J. I think the plaintiff ought to have been nonsuited. If the plaintiff had made a claim in respect of necessaries provided for the defendant's wife, the case would have stood upon a very different ground; but I think, upon the evidence, it appeared that the things provided were not necessaries. They consisted of articles of jewelry, and the wife had upon her marriage been supplied with a sufficiency of such things, considering her situation in life. Undoubtedly the husband is liable for necessaries provided for his wife, where he neglects to provide them himself. If, however, there be no necessity for the articles provided, the tradesman will not be entitled to recover their value, unless he can show an express or implied assent of the husband to the contract made by the wife. Where a tradesman takes no pains to ascertain whether the necessity exists or not, he supplies the articles at his own peril; and if it turn out that the necessity does not exist, the husband is not responsible for what may be furnished to his wife without his knowledge. Where a tradesman provides articles for a person whom he knows to be a married woman, it is his duty, if he wishes to make the husband responsible, to inquire if she has her husband's authority or not; for where he chooses to trust her, in the expectation that she will pay, he must take the consequence if she does not. If it turn out that she did act under the authority of her husband when she gave the orders, he will be liable, but otherwise he will not. If we were to hold that he would, no man in any case would be safe if the wife chose to say that she had the authority of her husband. I think that the burden of the proof of the assent of the husband lies on the party who provided the goods, and who acted upon the supposed authority. In this case, it appears to me that the proof was to the contrary, and that it negatived all presumption of assent on the part of the husband. I think, therefore, that the plaintiff did not make out a case to entitle him to recover.

LITTLEDALE, J. I agree in thinking that a nonsuit must be

entered. The husband is not liable in respect of a contract made by his wife without his assent to it, and a party seeking to charge him in respect of such a contract is bound either to prove an express assent on his part, or circumstances from which such assent is to be implied. Then was there any express assent in this case? So far from that, it appears that no application was made to the defendant for several months after the articles had been delivered; but the plaintiff always called when he knew the defendant was from home; and always asked for the wife. There was, therefore, no express assent of the husband. Then can we say that there was any implied assent? There are many cases in which the assent of the husband may be presumed. In Comyns' Digest, tit. Baron and Feme (Q), it is laid down, that if the wife trades in goods, and buys for her trade when she cohabits with her husband, his assent is to be presumed; and if a wife buy necessary apparel for herself, the assent of the husband shall generally be intended. But here the apparel provided consists of articles of ornament of considerable value. It does not appear, considering the defendant's occupation, and his wife's fortune, that articles of jewelry to that amount can be considered as necessary apparel, and one reason is, because the wife had articles of that description provided for her when she married, and there is no evidence to show that the husband ever saw the wife wearing these articles and if he did not, then there is nothing to show any implied assent.

ABBOTT, C. J. I entirely agree with the opinion which has been delivered by my learned brothers, and I think the rule for a non-suit ought to be made absolute. If this decision should have the effect of introducing somewhat more caution into the conduct of those who are to obtain their living by selling their goods and wares, it will be most beneficial. It will occasionally be beneficial to infants, to fathers, to husbands, and to friends; it will also be beneficial to those who have goods to sell, for the experience we have in courts of justice leads us to know that persons who trade without due caution often find their hopes deceived; they find in the result, that they have parted with goods for which they never can obtain the money. The rule must be made absolute.

Rule absolute for a nonsuit.

SEATON v. BENEDICT.

(5 Bing. 28. Court of Common Pleas, 1828.)

Husband's Liability for Wife's Necessaries.

Assumpsit for goods sold and delivered. The defendant pleaded the general issue, except as to 10l., which he tendered and paid into court.

By a bill of particulars, it appeared that the plaintiff's demand amounted to 281. 5s. 6d., for kid gloves, ribbons, muslins, lace, silks, and silk stockings, thirteen pair of which, of a very expensive description, were charged for, as having been delivered on one day.

At the trial before Burrough, J., Middlesex Sittings after Hilary Term last, it appeared that the defendant, a gentleman in the profession of the law, was, at the time when the plaintiff furnished the goods, living with his wife at Twickenham, and had supplied her wardrobe well with all necessary articles; that the plaintiff, a tradesman at Richmond, had, without the defendant's knowledge, furnished the defendant's wife with the articles for which this action was brought, the greater part of which were delivered to her in the plaintiff's shop, and the remainder into her own hand at the defendant's door.

It did not appear that the defendant had seen her wear any of them, except, perhaps, the gloves, and some of the silk stockings, the price of which did not amount to 10l.

On behalf of the defendant, it was contended that these articles were not necessary for the wife of a person in his degree; that no actual authority for them had been proved; and that an authority could not be implied for the purchase of anything but necessaries.

The learned Judge told the jury that he should have been of this opinion, but for the plea of tender; that plea admitted that the wife had authority to purchase some of the articles; and as it was not stated in respect of which of them the tender had been made, it must be taken to apply to all, admitting the authority to purchase them all, and contesting only the price at which they were charged.

A verdict, therefore, was taken for the plaintiff for 181. 5s. 6d., with leave for the defendant to move to set it aside, if the learned Judge should be thought to have given an effect to the tender which it ought not to have.

Wilde, Serjt., accordingly obtained a rule nist for a new trial, on the ground that the goods furnished were not necessaries, and that no authority could be implied from the tender except an authority to purchase goods to the extent of 10L

Taddy, Serjt., showed cause, and cited Bennett v. Francis, 2 B. & P. 550; Montague v. Benedict, 3 B. & C. 631; Holt v. Brien, 4 B. & A. 252; Bartley v. Griffin, 5 Tannt. 356.

Wilds referred to Cox v. Parry, 1. T. R. 464; Black-burne v. Schoales, 2 Campb. 341; Etherington v. Parrott, 1 Salk. 118.

BEST, C. J. I think there ought to be a new trial in this case. The learned Judge left the point correctly to the jury, but gave too much effect to the payment of money into court. Independently of this, the defendant, in point of law, was entitled to a verdict. A husband is only liable for debts contracted by his wife on the assumption that she acts as his agent. If he omits to furnish her with necessaries, he makes her impliedly his agent to purchase them. 'If he supplies her properly, she is not his agent for the purchase of an article, unless he sees her wear it without disapprobation. In the present case the husband furnished his wife with all necessary apparel, and he was ignorant that she dealt with the plaintiff. No article was delivered in his presence, nor was there distinct proof that any had been worn. If, therefore, money had not been paid into court, the defendant was clearly entitled to a verdict. What, then, is the effect of that payment? If the money had been paid in on the first items of the bill, an authority to contract at the date of these items would have been acknowledged, — an authority which could not afterwards have been retracted but by express notice. But there is no evidence to show that the money was not paid in on the last items; and if so, there was no agency for the first. The payment into court, therefore, recognizes no agency beyond the amount of And if so, there is no pretence for supporting this verdict. It may be hard on a fashionable milliner that she is precluded from supplying a lady without previous inquiry into her authority. The Court, however, cannot enter into these little delicacies, but

must lay down a rule that shall protect the husband from the extravagance of his wife.

GASELEE, J. It is difficult to lay down an abstract rule with respect to the liability of the husband; but on the subject of the payment of money into court I entertain no doubt. Payment into court generally in assumpsit admits nothing beyond the amount of the sum paid in. Where, indeed, there is a special contract, the payment into court admits that contract; but where, as in the common indebitatus assumpsit, the demand is made up of several distinct items, the payment admits no more than that the sum paid in is due. In Cox v. Barry, Blackburn v. Schooles, and Bennett v. Francis, the claim arose on a single transaction.

On these grounds, it seems to me that too much weight was attached to the circumstance of the payment into court. The jury were probably embarrassed by it, and the verdict ought not to stand.

Bule absolute.

BERTLES v. NUNAN.

(92 N. Y. 152. Court of Appeals of New York, 1883.)

Conveyance to Husband and Wife. Estate by the Entirety.

EARL, J. On the 1st day of August, 1868, certain land, which is the subject of this controversy, was conveyed by deed to Cornelius Day and Hannah Day, his wife, and to their heirs and assigns; and the sole question for our determination is whether the grantees took the land as tenants in common, or whether each took and became seized of the entirety.

By the common law, when land was conveyed to husband and wife, they did not take as tenants in common, or as joint tenants, but each became seized of the entirety, per tout, et non per my, and upon the death of either the whole survived to the other. The survivor took the estate, not by right of survivorship simply, but by virtue of the grant which vested the entire estate in each grantee. During the joint lives the husband could, for his own benefit, use, possess, and control the land, and take all the profits thereof, and he could mortgage and convey an estate to continue during the joint lives, but he could not make any disposition of

the land that would prejudice the right of his wife in case she survived him.

This rule is based upon the unity of husband and wife, and is very ancient. It must have had its origin in the archaic period of our race, and it colored all the relations of husband and wife to each other, to the law, and to society. In 1 Blackst. Com. 442, the learned author says: "Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities that either of them acquired by the marriage. I speak not, at present, of the rights of property, but of such as are merely personal. For this reason a man cannot grant anything to his wife or enter into covenant with her; for the grant would be to suppose her separate existence, and to covenant with her would be only to covenant with himself." They were not allowed to give evidence against each other, mainly because of the union of person, for if they were admitted to be witnesses for each other they would contradict one maxim of the common law, Nemo in propria causa testis esse debet; and if against each other, they would contradict another maxim, Nemo tenetur se ipsum accusare.

As one of the consequences of the same rule, the husband was made responsible to society for his wife. He was liable for her torts and frauds, and, in some cases, for her crimes.

This, and the other rules regulating the effect of marriage at common law, were not designed to degrade and oppress the wife. Blackstone (2 Com. 445) says: "Even the disabilities which the wife lies under are, for the most part, intended for her protection and benefit; so great a favorite is the female sex of the laws of England."

The common-law rule as to the effect of a conveyance to husband and wife continued in force, notwithstanding the Revised Statutes, which provided that "every estate granted or devised to two or more persons in their own right shall be a tenancy in common unless expressly declared to be in joint tenancy." 3 R. S. 2179 (7th ed.); Dios v. Glover, 1 Hoff. Ch. 71; Torrey v. Torrey, 14 N. Y. 480; Wright v. Saddler. 20 id. 320. In the latter case, Comstock, J. said: "It appears to be well settled that this statute does not apply to the conveyance of an estate to husband and wife. They are regarded in law as one person."

But the claim is made that the legislation in this State, in the years 1848, 1849, 1860, and 1862, in reference to the rights and property of married women, has changed the common-law rule so that now, when land is conveyed to husband and wife, they take as tenants in common, as if unmarried. In construing these statutes the rule must be observed, and usually has been observed, that statutes changing the common law must be strictly construed, and that the common law must be held no further abrogated than the clear import of the language used in the statutes absolutely requires.

Section 3 of chapter 200 of the Laws of 1848, as amended by chapter 375 of the Laws of 1849, provides that "any married female may take by inheritance or by gift, grant, devise, or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise, real and personal property, or any interest or estate therein, and the rents, issues, and profits thereof, in the same manner and with like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband, or be liable for his debts." It is not the effect of this section, and plainly was not its purpose, to change the force and operation of a conveyance to a wife. It does not enlarge the estate which a wife would otherwise take in land conveyed to her, and whatever the effect of a conveyance to a husband and wife was prior to that statute, so it remains. If the operation of such a conveyance was to convey the entire estate to each of the grantees, so that each became seized of the entirety, there is nothing in the force or effect of the language used to change the operation of such a deed so as to make the grantees tenants in common. The section gives the wife no greater right to receive conveyances than she had at common law, but its sole purpose was to secure to her during coverture, what she did not have at common law, the use, benefit, and control of her own real estate, and the right to convey and devise it as if she were unmarried.

By section 1 of the act (chapter 90 of the Laws of 1860) it is provided that "the property, both real and personal, which any married woman now owns as a sole and separate property; that which comes to her by descent, devise, bequest, gift, or grant; that which she acquires by her trade, business, labor, or services, carried on or performed on her sole and separate account; that

which a woman married in this State owns at the time of her marriage, and the rents, issues, and profits of all such property, shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected, and invested by her in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts;" and in section 3 of the act of 1860, as amended by the act chapter 172 of the Laws of 1862, it is provided that "any married woman possessed of real estate as her separate property may bargain, sell, and convey such property, and enter into any contract in reference to the same, with the like effect, in all respects, as if she were unmarried." There is great plausibility in the claim that these provisions in the acts of 1860 and 1862 have reference only to the separate property of a wife, which she uwns separate from her husband, and that they have no reference whatever to land conveyed to husband and wife, in which, by the common law, each became seized of the entirety. The language is not so strong and direct as that of the Revised Statutes, which provided that a grant to two or more persons shall create a tenancy in common, and which was yet held not to make husband and wife tenants in But it is not necessary now to determine that these common. provisions of law do not apply to lands conveyed to husband and wife, and we pass that question. It is sufficient now to hold that they do not limit or define what estate the husband and wife shall take in lands conveyed to them jointly. Their utmost effect is to enable the wife to control and convey whatever estate she gets by any conveyance made to her solely, or to her and others jointly.

The claim is made that the legislation referred to has destroyed the common-law unity of husband and wife, and made them substantially separate persons for all purposes. We are of the opinion that the statutes have not gone so far. The legislature did not intend to sweep away all the disabilities of married women depending upon the common-law fiction of a unity of persons, as a brief reference to the statutes will show. The act of 1848 gave no express authority to a married woman to grant or dispose of her property; such authority came by the act of 1849. The legislature clearly understood that the common-law unity of husband and wife and the disabilities dependent thereon still remained, notwithstanding those acts, because in 1860, by the act of that year, it empowered a mar-

ried woman to perform labor and to carry on business on her separate account, to enter into contracts in reference to her separate real estate, to sue and be sued in all matters having relation to her property, and to maintain actions for injuries to her person. Until 1867 (chap. 782) husbands retained their common-law right of survivorship to the personal property of their wives. It was not until chapter 887 of the laws of the same year that husband and wife could, in civil actions, be compelled to give evidence for or against each other; and in 1876 (chap. 182), for the first time, they could be examined in criminal proceedings as witnesses for each other; and provision was first made in the Penal Code (§ 715) that they could, in criminal proceedings, be witnesses for and against each other.

From this course of legislation it is quite clear that the legislature did not understand that the common-law rule as to the unity of husband and wife had been abrogated by the acts of 1848, 1849, and 1860, and that whenever it intended an invasion of that rule, it made it by express enactment. Still more significant is the act chapter 472 of the Laws of 1880, which provides that "whenever husband and wife shall hold any lands or tenements as tenants in common, joint tenants, or as tenants by entireties, they may make partition or division of the same between themselves" by deeds duly executed under their hands and seals. Here the disability of husband and wife, growing out of their unity of person, to convey to each other, is recognized, as is also the estate by entireties created by a deed to them jointly.

So the common-law incidents of marriage are swept away only by express enactments. The ability of the wife to make contracts is limited. Her general engagements are absolutely void, and she can bind herself by contract only as she is expressly authorized to do so by statute. A husband still has his common-law right of tenancy by the curtesy. Although section 7 of the act of 1860 authorizes a married woman to maintain an action against any person for an injury to her person or character, yet we have held that she cannot maintain an action against her husband for such an injury; and so it was held, notwithstanding the acts of 1848, 1849, and 1860, that the common-law disability of husband and wife growing out of their unity of person to convey to each other still existed. White v. Wager,

25 N. Y. 333; Winans et al. v. Peebles et al., 32 id. 423; Meeker v. Wright, 76 id. 262, 270. It is believed, also, that the common-law rule as to the liability of the husband for the torts and crimes of his wife are still substantially in force.

We fail, therefore, to find any reason for holding that the common-law rule as to the effect of a conveyance to husband and wife has been abrogated, and this conclusion is sustained by considerable authority. In Goelet v. Gori, 31 Barb. 314, SUTHERLAND, J., at Special Term, held that a lease for a term of years, euecuted to husband and wife, was unaffected by the acts of 1848 and 1849, and that husband and wife by conveyances to them still took as tenants by the entirety. Farmers and Mechanics' National Bank of Rochester v. Gregory, 49 Barb. 155, it was held at General Term that the statutes referred to had no relation to or effect upon real estate conveyed to husband and wife jointly, and that in the case of such a conveyance, notwithstanding those statutes, they take as tenants by the entirety. Johnson, J. commenced his opinion by saying: "To my mind it is a very clear proposition that our recent statutes for the better protection of the separate property of married women have no relation to or effect upon real estate conveyed to husband and wife jointly." That decision was rendered in 1867, and the conveyance which was there the subject of consideration was executed in 1864. In Miller v. Miller, 9 Abb. Pr. (N. S.) 444, MURRAY, J., at Special Term, in 1871, feeling bound by the decision last referred to, held that the common-law rule was applicable to a conveyance made to husband and wife in 1867. In Freeman v. Barber, 3 N. Y. Sup. Ct. (T. & C.) 574, the same rule was applied in 1874 by the Supreme Court in the third department. The opinion of the court was written by MILLER, P. J., in which he stated that he regarded the law as settled in this State that, in the case of a conveyance to husband and wife, they take, not as joint tenants or as tenants in common, but as tenants by entireties, notwithstanding the acts referred to. In Beach v. Hollister, 3 Hun, 519, decided in 1875, a similar decision was made. GILBERT, J., writing the opinion of the court, said: "These statutes operate only upon property which is exclusively the wife's, and were not intended to destroy the legal unity of husband and wife, or to change the rule of the common law governing the effect of conveyances to them jointly." In Ward

v. Crum, 54 How. Pr. 95, decided in 1876, VAN Vorst, J., at Special Term, held that, under a deed executed to husband and wife in 1872, both became seized of the entirety, although the wife paid the entire consideration of the conveyance.

It is true that these decisions are not absolutely binding upon this court, but they settled the law in the Supreme Court. For twenty years after 1849 there was no decision or published opinion in this State in conflict with them, and they are, under the circumstances, entitled to great weight here. They undoubtedly lay down a rule which has been followed and observed by conveyancers, and we have no doubt that property to the value of millions is now held under conveyances made in reliance upon the common-law rule as thus expounded. These decisions were never questioned in this State by any court until the decision in the case of Meeker v. Wright, which was rendered in this Court in 1879 (76 N. Y. 262). In that case the learned judge writing the opinion reached the conclusion that the common-law rule governing conveyances to husband and wife had been abrogated by the modern legislation in this State. But that portion of the opinion was not concurred in by a majority of the judges. The views of that judge were very forcibly and ably expressed, and they have been carefully reconsidered. They do not convince us that the conclusions he reached should be adopted by this Court. That case is supposed to have unsettled the law somewhat in this State. In Feely v. Buckley, 28 Hun, 451, it was held upon its authority, by a divided court, that tenancy by the entirety is abrogated by the Married Women's Acts; and upon the same authority it is said a similar holding was made in Zorntlein v. Bram, decided in the Superior Court of New York, in January of this year, by a divided court. It is also said that in Forsyth v. McCall, in the fourth department in June, 1880, and in Meeker v. Wright, after a new trial, in the third department, in April, 1882, it was decided that the common-law rule was not abrogated. (27 Albany Law Journal, 199.) these decisions, together with the one which is now under review, are all the decisions made in this State since the case of Meeker v. Wright was in this Court which have come to our attention.

Legislation similar to that which exists in this State, as to the rights and property of married women, exists in many of

the States of the Union, and the decisions are nearly uniform in all the other States where the question has arisen, that a conveyance to husband and wife has the common-law effect, notwithstanding such legislation. Without citing all, we call attention to the following eases and authorities: Bates v. Seeley, 46 Penn. St. 248; French. v. Mahan, 56 id. 289; Diver a Diver, id. 106; Fisher v. Peovin, 25 Mich. 350; McDuff v. Beauchamy, 50 Miss. 581; Washburn v. Burns, 34 N. J. 18; Chandler v. Cheney, 37 Ind. 891; Morburgh v. Cole, 49 Md. 402; 33 Am. Rep. 266; Bennett v. Child, 19 Wis. 362; Rabinson v. Eagle, 29 Ark. 202; 1 Washb. en Beal Prop. (3d ed.) 577; Schouler on Husband and Wife, §§ 397, 398; 1 Bishop on the Laws of Married Women, 438, §§ 613, etc.; 2 id. 284, § 284. In the last section the learned author says: "Under the late married women's statutes, the effect of which is to prevent any part of the wife's interest in her lands passing to her husband, the rule of the common law, by force of which the two became tenants by the entirety of lands conveyed to both, is not changed;" and he says: "The reason for the doctrine, looking at the question in the light of legal principle, is, that the statutes which preserve to married women their separate rights of property do not have, or profess to have, any effect upon the capacity of the wife to take property, or the manner of her taking it, but when she does take it they simply preserve the right in her, to her separate use, forbidding it to pass in part or in full to her husband under the rules of the unwritten law. If, then, land is conveyed to a husband and his wife, they take precisely as at the common law, — that is, as tenants by the entirety." In Diver v. Diver, Strong, J. said: "But it is said the act of 1848, by destroying the legal unity of the husband and wife, has converted such an estate into a tenancy in common; that is, that such a deed conveys a different estate from that which the same deed would have created if made prior to the passage of the act. this we cannot assent. It mistakes alike the letter and the spirit of the statute, imputing to it a purpose never intended. The design of the legislature was single. It was not to destroy the oneness of husband and wife, but to protect the wife's property, by removing it from under the dominion of the husband. effect this object, she was enabled to own, use, and enjoy her property, if hers before marriage, as fully after marriage as before, and the act declared that, if her property accrued to her after marriage, it should be owned, used, and enjoyed by her as her own separate property, exempt from liability for the debts and engagements of her husband. All this had in view the enjoyment of that which is hers, not the force and effect of the instrument by which an estate may be granted to her. It has nothing to do with the nature of the estate. The act does not operate upon rights accruing to her until after they have accrued. It takes such rights of property as it finds them, and regulates the enjoyment, that is, the enjoyment of the estate after it has vested in the wife."

At common law where the estate was conveyed to husband and wife, as above stated, the husband had the control and use of the property during the joint lives. It is unnecessary now to determine whether, under the Married Women's Acts in this State, the husband still has such a right in real estate conveyed to him and his wife jointly. It was said in some of the authorities cited that the statutes had changed that common-law rule, and that while husband and wife, in conveyances to them jointly, each took the entirety, yet that the land could not be sold for the husband's debts, or the use and profits thereof during their joint lives be entirely appropriated by him. It is not important in this case to determine what the relation of the wife to the land, in such a case, now is, during the life of her husband.

It is said that the reason upon which the common-law rule under consideration was based has eeased to exist, and hence that the rule should be held to disappear. It is impossible, now, to determine how the rule, in the remote past, obtained a footing, or upon what reason it was based, and hence it is impossible now to say that the reason, whatever it was, has entirely ceased to exist. There are many rules appertaining to the ownership of real property originating in the feudal ages, for the existence of which the reason does not now exist, or is not discernible, and yet, on that account, courts are not authorized to disregard them. They must remain until the legislature abrogates or changes them, like statutes founded upon no reason, or upon reasons that have ceased to operate.

It was never, we believe, regarded as a mischief, that under a conveyance to husband and wife they should take as tenants by the entirety, and we have no reason to believe that it was within the contemplation of the legislature to change that rule. Neither do we think that there is any public policy which requires that the statute should be so construed as to change the common-law rule. It was never considered that that rule abridged the rights of married women, but rather that it enlarged their rights, and improved their condition. be against the spirit of the statutes to cut down an estate of the wife by the entirety to an estate as tenant in common with her husband. If the rule is to be changed, it should be changed by a plain act of the legislature, applicable to future conveyances; otherwise incalculable mischief may follow by unsettling and disturbing dispositions of property made upon the faith of the common-law rule. The courts certainly ought not to go faster than the legislature in obliterating rules of law under which many generations have lived and flourished, and the best civilization of any age or country has grown up.

We are, therefore, of opinion that the judgment should be affirmed, with costs.

All concur, except Danforth and Finch, JJ., who dissent upon the ground that the common-law doctrine was abrogated by the statutes which enable a wife to hold a separate estate, and for the reasons stated by the former in Meeker v. Wright, and his dissenting opinion in Schultz v. Schultz.

Judgment affirmed.

TIPPING v. TIPPING.

(1 Peere Wms. 729. High Court of Chancery, 1721.)

Wife's Personal Property. — Paraphernalia.

A., by articles before marriage, covenanted for himself and his heirs, with the wife's trustees, to lay out 3,500l. in a purchase of land to be settled on the wife for her jointure, remainder to the first, etc. sons of that marriage in tail male successively, and died intestate without issue, leaving assets in fee descending to his nephew, who was his heir at law; but the personal estate was not near sufficient for the payment of his debts.

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The widow, who was administratrix, brought her bill against the heir, to compel him to make good her jointure, and to have the deficiency of the personal supplied out of the real assets; and having jewels, etc. which were her bona paraphernalia of the value of 200l. and upwards, the question was, whether they in the first place, and in ease of the real assets, should be liable to satisfy this covenant, since bona paraphernalia were personal estate, and the rule was said to be, that all the personal ought to be applied in exoneration of the real estate.

LORD CHANCELLOR. I take it that bona paraphernalia are not devisable by the husband from the wife, any more than heirlooms from the heir, so that the right of the wife to the bona paraphernalia is to be preferred to that of a legatee. If the husband by his will gives a lease or a horse, or any specific legacy, and leaves a debt by mortgage or bond in which the heir is bound, the heir shall not compel the specific legatee to part with his legacy in ease of the real estate; but though the creditor may subject this specific legacy to his debt, yet the specific or any other legatee shall in equity stand in the place of the bond-creditor or mortgagee, and take as much out of the real assets as such creditor by bond or mortgage shall have taken from his specific or other legacy. Wherefore, if a legatee shall have this favor in equity, much more shall the wife be privileged with respect to her bona paraphernalia, which are preferred to legacies. Indeed, were the rule of equity otherwise, a specific legatee should compel the application of the bona paraphernalia to pay any debt in favor and ease of his specific legacy. Whereas bona paraphernalia are liable only to debts, and in favor of creditors, not of an heir; but any creditors by specialty are wholly unconcerned in this question, they being by reason of their bonds, etc. in all events secure, which must make it indifferent to them whether they are paid out of the real assets, or out of the bona paraphernalia; for still they are sure of being paid; and putting the creditors out of the case, the bona paraphernalia shall be retained by the wife.

So the LORD CHANCELLOR denied it to be a rule, that in all cases the personal is applicable in ease of the real estate; for it shall not be so applied if thereby the payment of any legacy will be prevented, much less where it will deprive the widow of her bona paraphernalia.



WHITON V. SNYDER.

(88 N. Y. 299. Court of Appeals of New York, 1882.)

Wife's Personal Property. — Paraphernalia.

Finch, J. The title to certain personal property is here in dispute between the representatives of the husband and wife respectively, and depends so largely upon the presumptions with which we approach the facts, as to compel their consideration and settlement at the outset of the inquiry. The property in dispute consisted of two certificates of deposit for \$2,300, payable to Elizabeth Snyder, the wife; a carriage; an old clock; three articles of the wife's wearing apparel; and a cabinet picture of herself. At the date of her death all these things were in her possession, but whether as her sole and separate property, or as that of her husband, intrusted merely to her custody or use in virtue of the marital relation, becomes a question about which the parties differ very widely, and the determination of which is quite essential to the case.

It has long been the law that the possession of personal property draws with it a presumption of ownership. At common law, that presumption utterly failed in the case of a married woman, because as against her husband, asserting his marital rights, she could not own such property. Bl. Com., bk. 2, chap. 29, p. 435; Curtis v. Del., L. & W. R. R. Co., 74 N. Y. 122. The marriage vested in the husband the right to reduce to his possession and ownership the wife's choses in action, and gave him the title to her personal chattels at once and absolutely. Jaycox v. Caldwell, 51 N. Y. 398. And this proceeded upon the ground, which was always more logical than true, that the very being and existence of the woman was suspended during the coverture, or entirely merged or incorporated in that of the husband. But unjust rules slowly give way before advancing civilization.

Very early the hardship of denying to the wife some degree of property in or control over her personal apparel, and the ornaments befitting her station, was felt and appreciated. It seemed harsh and rude that the husband should own them as he did the collar of his dog or the harness of his horse, and some modified

ownership and control was given to the wife, though still largely subservient to the title of the husband. The familiar phrase, borrowed from the civil law, bona paraphernalia, became the settled description of the wife's personal clothing and ornaments, and indicated in them a modified property recognized and protected to some moderate extent. Bl. Com., supra, 435; 11 Vin. Abr. 178. The husband could not devise them away, and after his death the widow could hold them as against his executors or legatees, but was obliged to surrender them to his creditors where there was a deficiency of assets. Even the presents given by him to her before marriage, such as jewels, rings, and pictures, could not afterward be saved from his creditors, although Lord Habbwicke thought such a case was "unfortunate and very hard." Bidout v. Earl of Plymouth, 2 Atk. 104. And the paramount title of the husband was still preserved, since he could dispose of these articles absolutely in his own lifetime. Seymour v. Fresilian, 3 Atk. 358; Graham v. Londonderry, id. 394. Our Revised Statutes relaxed somewhat the rule, and gave to the wife surviving the husband a title to her paraphernalia which his creditors could not assail. Curtis v. Del., L. & W. R. R. Co., supra. This common-law rule recognized the husband's title, solely from necessity and because the wife could not take. It practically gave her the use, and protected her in the enjoyment, of what was only not actually given, because it could not be. Even in equity, where a more liberal rule prevailed, the wife's paraphernalia were not considered as a gift to her separate use, because that would enable her to dispose of them absolutely, which was deemed contrary to the husband's intention. Graham v. Londonderry, supra. But the right of the wife, so far as it existed, rested upon the foundation of a gift, where the articles were provided by the husband. That right was described as an acquisition by the wife of a property in the husband's goods, and where it came from him without price or consideration, beyond affection and duty, it was a gift so far as a gift was The separate and personal possession by the wife of possible. articles specially fitted for and adapted to her personal use, and differing in that respect from household goods kept for the common use of both husband and wife, would have drawn after it the presumption of an executed gift, if the property came from the husband, and of the wife's ownership, but for the disabilities of

the marital relation. Now that those disabilities are removed, the several existence and separate property of the wife recognized, and her capacity to take and hold as her own a gift in good faith and fairly made to her by her husband established, it seems time to clothe her right with its natural and proper attributes, and apply to a gift to her, although made by her husband, the general rules of law unmodified and unwarped by the old disabilities of the marriage relation. Since the wife may take by gift from her husband as well as from others, and by purchase from any one, her separate and personal possession of specific articles must draw after it the presumption of ownership, and there is no longer reason for making her case exceptional, or excluding her from the operation of the general rule. Her wearing apparel and ornaments, given by her husband, pass into her personal and separate possession. Such is the intent with which they are given. They are made or selected with that view and for that plain purpose; their very character and use implies a personal gift, and a separate possession in which the husband does not share. Such possession of articles adapted plainly to the wife's separate and personal use, and not that of the husband or family generally, and so actually used by her, in the absence of other facts contradicting the inference, must be held to denote her ownership of the property, either as purchased out of her own means, or given to her by her husband or others. As to articles of a different character, such as furniture and household goods, adapted to the use of and used by the family generally, and in their common possession, a different rule must apply. Although specific articles may be spoken of as the wife's, or as got for her, the difficulty of establishing an executed gift by showing a delivery, or a separate and personal possession, remains. Such cases must stand upon their facts, and can rarely be brought within the range of a presumption of separate ownership. The title of the wife to her paraphernalia was distinctly recognized in Rawson v. Penn. R. R. Co., 48 N. Y. 212, and the doctrine there declared also answers a further contention of the appellant in the present The marriage of these parties took place-before 1848, and under the old rules applicable to that relation. It is therefore argued, that, as to the property in the wife's possession as to which no date or period of acquisition is established by the proofs, the legal presumption is that she obtained it anterior to the act of

1848, and that the referee erred in refusing so to find. If that presumption existed, it would still be true, as the case cited shows, that the wife would have had an equitable title, which, under the acts of 1860 and 1862, ripened at once into a legal right, and vested the property in her. But no such legal presumption attaches. The property being in the wife's separate and individual possession, at a time when her absolute ownership was possible, the latter presumption arises, and the party who seeks to repel it must prove the acquisition before the statutes relating to married women, and not ask the Court to presume it. Savage v. O'Neil, 44 N. Y. 301. The discord which the learned referee discerns between the cases of Rawson v. Penn. R. R. Co., and Curtis v. D., L. & W. R. R. Co., 74 N. Y. 116, exists only as to the fact of a gift. In the former case it was said to have been established, but in the latter, not. In the last case no question of title arose as between husband and wife, and the trunk lost contained the husband's own apparel and that of his child, as well as that of his wife. She was treated as representing the husband, and her possession of the baggage as being his, and the subject of her separate and personal possession of a part of the articles does not appear to have arisen.

The views thus expressed dispose of the questions of title presented in the case before us, except as to the carriage and clock. The money represented by the certificate of deposit, payable to the order of the wife, was her money, held by the bank for her and payable only to her, or upon her direction. When or where she obtained it we do not know, nor is it at all material. It was in her separate and exclusive possession; she received the interest upon it, and it was payable to her alone. The referee was right in sustaining her title to the certificates and the debt represented thereby. The articles of clothing were also hers. shown that she bought them and had them in her possession, and they were of such a character as to make that possession personal in her, and exclude the inference of possession by the husband or of both in common. The carriage and clock, however, are articles of a different character. We cannot assign either to the personal possession of the wife alone. They were for the common use of both, adapted to such use, and the carriage appears to have been bought and paid for by the husband, while the clock once belonged to the wife's father; but the manner of its transfer, or to whom,

does not appear. We should have great doubt about both of these articles but for one fact in the case. It appears that the defendant was brought before the surrogate to be examined as to his possession of any articles belonging to the estate of Mrs. Snyder. On that examination he swore that he had the carriage and clock in question, and that they were the property of the deceased wife. This evidence was objected to, and its admission is alleged as error, upon the ground that the defendant was administrator of his father and could not bind the estate by his admissions. Church v. Howard, 79 N. Y. 415. But he was sued as an individual. No claim was made against him as administrator, or against the estate which he represented. The inquiry was whether he was in possession of property belonging to the wife's estate. He admitted he had it, and promised to return it, and set up no claim as representative of his father. The proceeding against him, if he is treated as he was sued, merely as an individual, was one in which his answer was evidence against himself. But if, because he was administrator, the proceeding for his examination must be treated as one against the estate which he represented, and his answer taken in that capacity, then certainly his admission was made while engaged in the performance of an act relating to the estate. He stood there in a legal proceeding, resisting claims to take away property of the estate, and answering legitimate inquiries relating to the subject of his trust, and his admissions were competent and part of the res gests. Church v. Howard, supra. There was, therefore, before the referee, in these sworn admissions of the defendant, evidence of the plaintiff's title which tended to contradict the inferences from Snyder's purchase of the carriage and his possession of the clock. There was also other evidence, as to the carriage, of declarations of the husband that his wife bought it and it was hers. On this state of the evidence, we are not at liberty to resist the referee's finding of title in the plaintiff.

Exceptions were taken to the evidence of damages resulting from the detention of the certificates of deposit, and to the decision of the referee awarding them. It is said that an actual demand was not proved on the trial, nor found by the referee, and no wrongful withholding of the carriage was shown. The complaint, which was sworn to on June 28, 1879, alleges a formal demand and refusal. The answer does not deny, and therefore

admits it. The date of the demand is not shown further than that it was before the commencement of the action. The referee assumes the 2d of June, when the examination was had before the surrogate, as the date of the demand thus admitted, and allows as damages the difference between the lawful rate of interest and that paid upon the certificates from that date to that of the report. On that occasion the plaintiffs stood in the attitude of demanding a surrender of this property; the defendant so understood it, for it is proved that he said he should not turn it over unless he was obliged to; and finally, through his counsel, promised to give it up, but did not. We think the damages were properly allowed, and their amount upon the evidence was a question of fact for the judgment of the referee.

Evidence of the witness Buckley as to the value of the clock was objected to. He was a dealer in such articles and in decorative art goods, but had never seen the clock in dispute. It was described in a hypothetical question, and his opinion of its value asked. The first objection was that the inquiry assumed facts not proved. The contrary was the truth. Every item of the description was sworn to by one or more witnesses. It was said the witness had not seen the clock. That was true, but affected only the weight of his evidence and not his competency. It was objected that the inquiry was not confined to market value. We think it was. And, finally, his opinion as an expert was questioned. We think he was competent to give an opinion of value, and his answer was properly received.

Some other questions were raised not material to be considered. We discover no error in their disposition by the feree.

The judgment should be affirmed, with costs.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

Grad Stevent. Branch

CABOLINE ABBEY v. DEYO, JR., AS SHERIFF OF ULSTER COUNTY.

(44 N. Y. 343. Commission of Appeals of New York, 1871.)

Contract between Husband and Wife for services of former. — Husband as Wife's Agent. — Claims of Husband's Creditors.

Hunt, C. The plaintiff alleges that she carried on the flour and feed business in the summer of 1861, under the name of Stephen Abbey, Agent. Her husband she alleged to be her agent, and that as such he bought and sold and carried on the business for her. It was proved that, in making the purchases at Albany, the husband stated to the vendors that he was the agent of the plaintiff, and that the goods were charged to him as agent.

The defendant insists that there was no evidence that the plaintiff had employed or authorized her husband to make the purchases or transact business for her, and that the court should have so instructed the jury.

On this point the proof was that Stephen Abbey professed to act for the plaintiff; the son testified that he knew of his mother being engaged in business, commencing in 1861, and that she purchased goods in Albany; that he was the bookkeeper and saw the bills; that his mother often spoke to him about his remaining at home and remaining in the business; she often spoke to him about being in her employment, and that he had his board and clothes for his services, and that suits in relation to the business were brought in his mother's name.

Mr. Avery testified that he sold goods to the plaintiff in 1861, consisting of flour, corn, and oats; and that Stephen was irresponsible, and had judgments against him, and that he gave the credit to the plaintiff. He identified the goods as a portion of those in question here; and he testified that the plaintiff paid him \$200 on account of the goods purchased of him. This payment was made by the check of "S. Abbey, Agent." He further says that he called on the plaintiff for the money, at the house, when both she and her husband were present, and that he gave the check for \$200. If Mrs. Abbey, the plaintiff, had been sued by the Albany merchants for the price of goods thus sold to her, and

the above evidence had been given to prove the agency, it would have been quite satisfactory. No jury could have failed to find that her husband was her agent in purchasing the goods. In addition to this, it was found that the family consisted of the husband, the wife, who is the present plaintiff, two sons, one of whom was the clerk already mentioned, a daughter, and an aunt, all living together, as I infer, near to the place where the business was carried on. There was no contradictory evidence on this point of agency, and I think it warranted the inference that the husband was authorized by the wife to transact the business in question, and at the time of making the purchases.

The act of March, 1860 (Laws of 1860, chap. 90, page 157), in its second section, provides as follows: "§ 2. A married woman may bargain, sell, assign, and transfers her separate personal property, and carry on any trade or business, and perform any labor or service, on her sole and separate account; and the earnings of any married woman from her trade, business, labor, or services shall be her sole and separate property, and may be used and invested by her in her own name."

In Knapp v. Smith, 27 N. Y. 278, Judge Denio says, that a married woman may cultivate her land and manage her personal property by means of any agency which any other owner of property might employ, and that the produce thereof and the increase of stock would be hers. The agency thus referred to in the case before him was that of her husband.

In Gage v. Dauchy, 34 N. Y. 293, it was held that a wife might employ her husband to transact her business, and, although no agreement for his compensation was made between them, that the property would not thereby become subject to the payment of his debts.

In Buckley v. Wells, 35 N. Y. 518, it was decided that a married woman could manage her separate property through the agency of her husband, and was entitled to the profits of a mercantile business, conducted by her husband in her name, when the capital was furnished by her, and he had no interest but that of an agent. It was further held that the application of an indefinite portion of the income to the support of her husband did not impair the wife's title to the property. While the law does not require the wife to support the husband, it does not prohibit her from doing so; and where the property which is the subject of

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dispute does not come from him, this circumstance furnishes no evidence of fraud.

In arguing this point, the appellant's counsel insists that the services, the time and talents of the husband are valuable, and he has no more right to give them to his wife, as against his creditors, than to give to her his property to their prejudice. one, he says, is as much their property as the other. argument is entirely unsound. The property of a debtor, by the laws of all commercial countries, belongs to his creditors. He must be just before he is generous. He must pay before he gives. Not so with his talents and his industry. Whether he has much, or little, or nothing, his first duty is the support of his family. The instinctive impulse of every just man holds this to be the first purpose of his industry. The application of the debtor's property is rigidly directed to the payment of his debts. He cannot transport it to another country, transfer it to his friend, or conceal it from his creditor. Any or all of these things he may do with his industry. He is at liberty to transfer his person to a foreign land. He may bury his talent in the earth, or he may give it to his wife or friend. No law, ancient or modern, of which I am aware, has ever held to the contrary. No country, unless both barbarous and heathen, has ever authorized the sale of the person of a debtor for the satisfaction of his debts.

The judge charged the jury that they were to find whether the plaintiff was in fact carrying on business herself, her husband acting merely as her agent, or whether the business was in fact her husband's, and the agency a form or device for carrying on business with his own means and her son's services. If the former, he charged them that the wife could hold the property. If the latter, he charged them that the property belonged to the creditors, and the wife must be defeated. This was the precise question for the jury to decide, and it was clearly and fairly placed before them. Their decision is conclusive here.

An objection was made to certain evidence given by Mr. Judson. He testified that he had sold goods in 1861 to the plaintiff through her agent; that the credit was given to Mrs. Abbey; the goods were delivered on the boat; that he recognized the flour and the meal; that they were to be paid for in fifteen or twenty days, and that the goods on the boat were not paid for.

The evidence that the goods were not paid for was objected to by the defendant, as immaterial and irrelevant. If Mr. Judson had desired to recapture the goods, this evidence would have been important. Upon the question of title between Mrs. Abbey, the plaintiff, and the creditors of her husband, it could have no possible effect for good or for evil. It was conceded that title had passed upon the sale by Mr. Judson, and that the property was in Mrs. Abbey or in her husband. The question was merely in which of them was it vested. On that question the payment to Mr. Judson or the non-payment could have no possible effect. Its admission, therefore, furnishes no ground for setting aside the verdict. People v. Kennedy, 39 N. Y. 245.

Judgment should be affirmed, with costs.

EARL, C. There was some evidence tending to show that the plaintiff carried on the business through her husband as her agent, and that all the property was purchased by her and in her name through her husband as her agent. Whether the business was thus carried on and the property thus purchased really and in good faith for her, or whether it was all a mere cover and really for her husband, to keep his property out of the reach of his creditors, were questions of fact fairly submitted to the jury, and their verdict for the plaintiff is, as to these questions, final and conclusive. Since the passage of the "act concerning the rights and liabilities of husband and wife," (chap. 90, Laws of 1860,) there can be no longer a question that a married woman can carry on business on her sole and separate account, and that in such business she can purchase property for cash or upon credit, and that she can manage her business and property through her husband as her agent. Knapp v. Smith, 27 N. Y. 277; Buckley v. Wells, 33 N. Y. 518; Gage v. Dauchey, 34 N. Y. 293; Merchant v. Brunell, 3 Keyes, 539; Draper v. Stouvenel, 35 N. Y. 507; Sammis v. McLoughlin, 35 N. Y. 647.

The creditors of an insolvent have no claim upon his services. They cannot compel him to work and earn wages for their benefit, and hence he does not defraud them if he chooses to give away his services by working gratuitously for another. The husband may, therefore, in the management of his wife's separate business or property, work for her, as any other person might,

without any compensation, and his creditors would not thereby gain any rights against the wife or her property, and would have no legal right to complain.

This judgment should, therefore, be affirmed with costs. All concur.

Judgment affirmed, with costs.

COLEMAN v. BURR.

N

(93 N. Y. 17. Court of Appeals of New York, 1883.)

Contract between Husband and Wife for Services of the latter. — Conveyance to Wife in Consideration of Services. — Claims of Husband's Creditors.

EARL, J. This action was brought to set aside a deed of sixty-two acres of land, made by the defendant Isaac C. Burr, to Franklin P. Smith, and by him to Ellen A. Burr, the wife of Isaac, on the ground that the deeds were made with intent to hinder, delay, and defraud the creditors of Isaac, of whom the plaintiff was one. The facts, as they appear from the findings of the referee, upon which alone this appeal is based, are as follows. In the year 1869, the defendant Isaac lived upon the land conveyed, and had a family consisting of himself, his wife, the defendant Ellen, two children of his wife by a former husband, his two children by his wife Ellen, and his mother, who lived in a part of his house and whom he had engaged to support in consideration of a conveyance by her to him of twentysix of the sixty-two acres of land. His mother was about eighty years of age, and in the month of January of that year she had an attack of paralysis, which rendered her partially She had another attack in the month of February, helpless. and still another in the month of April, which substantially rendered her helpless. After the last attack she could not walk or feed herself for a year or more. The care of her devolved mainly upon Mrs. Burr, and her services in such care were onerous, exacting, and disagreeable. Soon after the last attack, it was considered in the family that it would be a most unpleasant and disagreeable duty to take charge of the mother, and provide for and administer to all her wants in her helpless

condition, and it was agreed between Mr. Burr and his wife that, if she would undertake to discharge such duty, she would be paid by him for her labor and services the sum of five dollars a week, which, in view of the very irksome, laborious, and disgustful duty she performed during the residue of the life of the mother, was no more than a fair and reasonable compensation for such labor and services. The mother lived after the last attack of paralysis, and after this agreement was made, eight years and four months, and the compensation agreed upon amounted to \$2,175.

The referee found that the contract between Mr. and Mrs. Burr was a fair, just, and honest one, made at a time when there was little expectation on their part that the life of the mother would be so greatly prolonged, considering her advanced age, her disease and helpless condition. For the purpose of paying the sum which it was claimed thus became due to his wife on the 29th day of December, 1877, Isaac and his wife conveyed the sixty-two acres of land to the defendant Smith for the nominal consideration of \$1.00, and on the same day Smith executed and delivered a deed of the same land to the wife for the same nominal consideration. The deeds were both delivered at their date, and acknowledged and recorded. Prior to the execution of these deeds Isaac C. Burr was indebted in the various sums mentioned in the complaint, for which, before the commencement of this action, judgments had been obtained against him, upon which executions had been issued and returned unsatisfied.

The referee decided that, as matter of law, the contract established by the proof between the husband and wife, indicated a clear and explicit election on her part, with his consent, to render the labor and services performed by her as nurse, in taking care of her husband's mother in her sickness, on her sole and separate account, and to claim the fruits of her labor and services for herself, and showed her intention to avail herself of the privilege conferred upon her by the statute; and that the agreement on the part of her husband to pay her for such services was an abandonment on his part of his marital rights to claim or require such services and labor, and created a valid contract in law, and gave her a right to the stipulated price and value of her services which constituted them, or the amount

due her for such services, a valid debt against her husband, which was sufficient in law and equity to form the consideration for the deed executed to her as before stated; and he decided that the deeds were not fraudulent and void, and that the complaint should be dismissed.

The sole question for our determination now is, whether the conveyance of the land to Mrs. Burr is sustained by a consideration good as against the creditors of the husband. It must be conceded that the contract between the wife and the husband. in reference to these services, would, at common law, have been void, as she could make no contract with her husband, and her services, whether rendered in her husband's family or elsewhere, absolutely belonged to him. Gerry v. Gerry, 11 Gray, 381; Cramer v. Reford, 17 N. J. Eq. 367; Henderson v. Warmack, 27 Miss. 830; Shaeffer v. Sheppard, 54 Ala. 244; Glaze v. Blake, 56 id. 379; Duncan v. Roselle, 15 Iowa, 501; Hay v. Hayes, 56 Ill. 842; Kelly's Contracts of Married Women, 153; Schouler on Husband and Wife, §§ 294, 296. But modern legislation in this State has enlarged the powers of married women. By the acts of 1848 and 1849, for the protection of the property of married women, a husband was deprived of that right to and control of his wife's property which the common law gave him. The purpose of those acts was to protect married women against unkind, thriftless, or profligate husbands, by securing to them the separate and independent control of all their own property. But those acts went no further.

By chapter 90 of the Laws of 1860, still further protection was given to married women, and a wife was authorized to carry on any trade or business, and to perform any labor or services on her sole and separate account, and her earnings from her trade, business, labor, or services thus carried on or performed were declared to be her sole and separate property. It was the purpose of those provisions to secure to a married woman, free from the control of her husband, the earnings and profits of her own business and of her own labor and services, carried on or performed on her sole and separate account, which at common law would have belonged to her husband. It was not their purpose, however, to absolve a married woman from the duties which she owes to her husband, to render him service in his household, to care for him and their common children

with dutiful affection when he or they need her care, and to render all the services in her household which are commonly expected of a married woman, according to her station in life. Nor was it the purpose of the statute to absolve her from due obedience and submission to her husband as head and master of his household, or to depose him from the headship of his family, which the common law gave him. He still remains liable to support and protect his wife and responsible to society for the good order and decency of his household. He is to determine where he and his family shall have a domicile, how his household shall be regulated and managed, and who shall be members of his family. The statutes referred to touch a married woman in her relations to her husband only so far as they relate to her separate property and business, and the labor she may perform on her sole and separate account. In other respects the duties and responsibilities of each to the other remain as they were at common law.

Prior to 1860 it was never heard of, as a mischief to be remedied by legislation, that a wife could not earn money on her own account from her husband; that she could not demand pay from him for services rendered in his household; that she could not contract with him for services to be rendered for him; and the statute of that year above referred to was not enacted to remedy such a mischief. Married women frequently carried on business and thus earned money, and they frequently labored for others not members of their family and earned money, and all their earnings from their business or labor, at common law, belonged to their husbands. This was considered a hardship, and it was the purpose of the law to change this common-law rule and to secure these earnings to the wife, and the law-makers could have had no other end in view.

Whatever services a wife renders in her home for her husband cannot be on her sole and separate account. They are rendered on her husband's account in the discharge of a duty which she owes him or his family, or in the discharge of a duty which he owes to the members of his household.

It would operate disastrously upon domestic life and breed discord and mischief, if the wife could contract with her husband for the payment of services to be rendered for him in his home; if she could exact compensation for services, disagree-

• able or otherwise, rendered to members of his family; if she could sue him upon such contracts and establish them upon the disputed and conflicting testimony of the members of the household. To allow such contracts would degrade the wife by making her a menial and a servant in the home where she should discharge marital duties in loving and devoted ministrations, and frauds upon creditors would be greatly facilitated, as the wife could frequently absorb all her husband's property in the payment of her services, rendered under such secret, unknown contracts.

A few cases may be referred to for illustration. In Grant v. Green (41 Iowa, 88), it was held that a contract between the guardian of an insane husband, and the wife, that the latter should care for the husband and receive a certain sum for her services, was without consideration and void, because she owed the service independently of any contract. It was stated by the judge writing the opinion that "the service was such an one as she owed her husband by virtue of the relation existing between them. She had no right to refuse to perform it, nor to demand compensation for performing it." In Filer v. N. Y. Central R. R. Co., 49 N. Y. 47; 10 Am. Rep. 327, it was held that the services and earnings of the wife belong to her husband, unless she is carrying on a trade or business, or performing labor or services on her sole and separate account, and that, in an action to recover damages for a personal injury, he, and not she, is entitled to recover consequential damages from her inability to labor. In Brooks v. Schwerin (54 N. Y. 343), it was held that under the law of 1860, "the services of the wife in the household in the discharge of her domestic duties still belong to the husband, and in rendering such service, she still bears to him the common-law relation. So far as she is injured so as to be disabled to perform such service for her husband, the loss is his, and not hers, and for such loss of service, he, and not she, can recover of the wrong-doer. But when she labors for another, her service no longer belongs to her husband, and whatever she earns in such service belongs to her as if she were a feme sole, and so far as she is disabled to perform such service by any injury to her person, she can, in her own name, recover compensation against the wrongdoer for such disability, as one of the consequences of the in-

jury." In Reynolds v. Robinson, 64 N. Y. 589, an action was brought by the husband to recover for services rendered by his wife to a boarder sick with a cancer, in his house, and it was held that he could recover. In that case it was said, "she was engaged in no business or service on her own account. She was in charge of his household, and as part of her household duties, rendered the service to a person in her husband's house, by contract with him. She was then working for her husband, and not for herself or on her own separate account. Notwithstanding the act, chapter 90, Laws of 1860, she could still work for her husband, she could devote all her time and service to him; and the circumstances of this case are such as to warrant the finding of the referee that the services were "rendered by him through her;" that "if the husband takes boarders into his house, or converts his house into an hospital for the sick, and his wife takes charge of his establishment, and thus aids him in carrying on his business, in the absence of special proof, all her services and earnings belong to her husband. Even under such circumstances the husband might covenant and agree that his wife should receive pay for her services on her own account; but in the absence of some agreement to that effect, the inference of law and fact would be that she was working for her husband in the discharge of her marital duties." It was not intended by anything that was said in that case to intimate that a wife could demand payment from her husband for any services rendered under the circumstances mentioned in that case; but that with his consent she could demand and receive, and hold to her separate use, payment from the persons thus taken into his house, for any services she there rendered to them in taking care of and nursing them. In Whitaker v. Whitaker, 52 N. Y. 368; 11 Am. Rep. 711, the facts were that on the 20th of August, 1868, the husband gave his wife a note for \$4,000, the only consideration of which was that the wife, aside from her household duties, had aided in the out-of-door work on her husband's farm, and that the husband gave it to her for the purpose of providing for her support and maintenance; that on the 6th of November, 1869, the husband died, and that after his death she presented this note as a claim against his estate; and it was held that she could not recover. It was said in the opinion that to uphold

notes given under such circumstances would be likely to lead to the perpetration of frauds; that "if a wife can be said to be entitled to higher consideration or compensation because she labors in the field instead of in her household, the law makes no such distinction. It never has recognized the right to compensation from her husband on account of the peculiar character of her services. In most cases she probably contributes more to the happiness of her family by the proper discharge of the delicate and responsible duties of her household, than by any outside labors, however arduous. It is clear that the law regards neither as any consideration for a promise. founded thereon, by the husband." In Birkbeck v. Ackroyd, 74 N. Y. 357; 30 Am. Rep. 304, it was held that the act of 1860 does not wholly abrogate the rule of the common law entitling the husband to the services and earnings of the wife; that she may still allow him to claim and appropriate the fruits of her labor, and in the absence of an election on her part to labor on her account, or of circumstances showing her intention to avail herself of the privilege conferred by the statute, the husband's common-law right is unaffected; that therefore where the husband and wife are living together, and mutually engaged in providing for the support of themselves and their family, and there is nothing to indicate an intention on the part of the wife to separate her earnings, the husband may maintain an action in his own name to recover them.

It will be perceived that none of these cases are precisely in point; but they lay down principles which throw some light upon this case. It is not claimed that any case can be found in this State, or elsewhere, which decides that a married woman can enforce a contract made with her husband for the payment for services rendered by her for him in his household; and as we understand it is not claimed in this case that if these services had been rendered in nursing and caring for the husband, or for any of the children of the husband and wife, a contract to pay for such services would have had any consideration to rest upon, or that the wife could have retained property conveyed to her in payment of such services against creditors pursuing But it is sought to make a distinction between such the same. services of the wife and those which she renders for one not strictly a member of the husband's family. Such a distinction

does not stand upon principle. A line drawn there would be merely an arbitrary one. While the wife cannot demand or receive payment as against creditors for services rendered in the care of her husband and children, can it upon principle be said that she can demand and receive payment for every service she renders in caring for visitors, from time to time, in her husband's house upon his invitation? Whenever she aids him in the discharge of a duty which he owes to an inmate of his house, who is yet not strictly a member of his family, can she stipulate for compensation? Whenever she nurses in sickness one of his children of a former marriage, a member of his family, can she lawfully demand a share of his property for her services? in this case the mother was properly part of the household. The husband was under a natural, legal, and contract obligation to support her. It would have shocked the moral sense of every right-minded person, if he had not supported her in his own household where she could have the tender care, suitable to her age and feeble condition, of her son and his wife and her grandchildren. He was under just as much natural, legal, and moral obligation to support his mother as he was to support his own children. When, therefore, the wife rendered service in caring for her, she was engaged in discharging a duty which her husband owed his mother, and precisely the same kind of duty which he owed to his children and to his wife. charging that duty she earned no money, she brought no increase to her husband's property and no income into the family. The services were rendered simply in the discharge of a duty which the husband owed to his mother, and in rendering them she simply discharged a marital duty which she owed to him. To hold that she could charge for services thus rendered, and not for services rendered in the care of her husband and children, would make an arbitrary distinction, resting, as we have before intimated, upon no principle.

In construing the statutes referred to, we must constantly keep in mind the objects which were to be attained, and the mischiefs which were to be remedied by them, and not adhere too closely to the precise language used. Section 7 of the statute of 1860 provides that any married woman may bring and maintain an action in her own name against any person for any injury to her person or character; and yet we have

held that she could not sue her husband for an injury to her person; and it was held in the case of Filer v. The Railroad Co., that unless, at the time, she was carrying on business, or rendering service on her sole and separate account, her inability to labor could not form an element of damages to be recovered in a case where she had been injured, although the statute provided that she could bring the action the same as if she were sole.

Whether or not a wife will do business or render service on her sole and separate account depends upon her election, and not upon her husband's consent. Shall we so construe the acts referred to that a married woman may make her husband her debtor every time she renders a service in his home to one lawfully there, but not strictly within the narrow circle of a normal family consisting of herself, her husband, and children? Such a construction would enable a married woman to absorb her husband's property before he knew it, and certainly before his creditors knew it. And no case can furnish a more forcible illustration than this. Here, the wife during the eight years and four months, it must be presumed, received from her husband a home, shelter, food, raiment and, if needed, medical attendance, and yet, at the end of the time, she had over \$2,000 in property taken from him, and he nothing but clamorous creditors. This is a degree of thrift which attends the labor of few men or women.

A married woman owes no duty to her husband to go out of his house and render service for persons not members of his family, and she owes him no duty to carry on any business in his house or elsewhere for the purpose of earning money for him, and the purpose of the statute is fully accomplished if she be permitted to retain as her own, money or property obtained by her in such business or by the rendition of such services. But when she renders service in the household in the discharge of a duty which she owes to her husband, or which he owes to another, an inmate of his family, and receives no payment from the person to whom the service is rendered, and is entitled to receive none, and brings no money or property by her service, to her husband, she cannot stipulate with him for compensation from him, and the services thus rendered are not under the protection of the statute of 1860. Thus we have a plain, clear rule,

easily applied, which will secure the remedy aimed at by the statutes, without any embarrassing or disastrous consequences.

It is true that these services of the wife were onerous and disagreeable; so they would have been if similar services had been rendered for a sick husband or a sick child. Her condition would have been still more unfortunate if she had been the invalid, and the husband or his mother had been called upon to perform similar onerous and disagreeable duties in caring for her.

Before closing this opinion one more point must be noticed. The statute (2 R. S. 137, § 4) provides that the question of fraudulent intent in cases of this character "shall be deemed a question of fact and not of law;" and the claim is made that here there is no finding by the referee of a fraudulent intent; but that on the contrary he has found the whole transaction to be fair and honest. He has, however, found facts from which the inference of fraud is inevitable, and although he has characterized the transactions as honest and fair, that does not make them innocent nor change their essential character in the eye of Mr. Burr must be deemed to have intended the natural and inevitable consequence of his acts, and that was to hinder, delay, and defraud his creditors. Bump on Fraud. Conv. [3d ed.] 22, 24, 272, 278; Cunningham v. Freeborn, 11 Wend. 241; Edgell v. Hart, 9 N. Y. 213; Ford v. Williams, 24 id. 359; Babcock v. Eckler, id. 623-632.

Upon the essential facts found the judgment should have been in favor of the plaintiff, and hence the referee erred as matter of law in giving judgment against him; and the General Term was right when as matter of law it reversed his judgment.

We are, therefore, of opinion that the order of the General Term should be affirmed, and judgment absolute should be rendered against the defendants, with costs.

All concur, except Danforth and Finch, JJ., dissenting.

Order affirmed and judgment accordingly.

N

BANK v. GUENTHER.

(123 N. Y. 568. Court of Appeals of New York, 1890.)

Contract between Husband and Wife for services of the former. — Payments to kim for his services and the support of his Family. — Claims of Wife's Creditors.

O'Brien, J. This action was brought by the plaintiff, a judgment-creditor of the defendant Georgianna J. Guenther, to annul and set aside as fraudulent and void a general assignment for the benefit of creditors, with preferences made by said Georgianna to the defendant, John L. Romer, on the 8th day of May, 1883, and also a mortgage for the sum of \$5,545.58, covering real estate, made by her on the same day to her husband, John G. Guenther. and John Dunbar, as executors of the last will of her father, Henry T. Gillett, who died in the year 1874. The referee to whom the case was referred sustained the mortgage, but held that the assignment was void because the assignor had included in it and directed the payment, as a preferred claim, of the sum of \$7,000 to the husband of the assignor, which claim the referee held was without any consideration. It appears that, after the assignment was made, the plaintiff and other creditors of the assignor began actions to procure judgments against her upon claims held by them on which attachments were issued to the sheriff and levy made upon certain personal property embraced in the assignment and in possession of the assignee, which was subsequently sold by virtue of the levy. The assignee brought an action in the Supreme Court against the sheriff for a conversion of this property. The sheriff set up the same facts in his defence, touching the validity of the assignment, as are relied upon to invalidate it in this action. Both actions were referred to the same referee, and they were tried together under a stipulation that the testimony, rulings, and objections should apply to both This action to set aside the assignment was brought in the Superior Court of Buffalo. The referee held in both cases that the assignment was void on account of the preference to John G. Guenther, the husband. The General Term of the Supreme Court in the suit by the assignee against the sheriff

reversed the judgment on the ground that the preference to the husband was supported by a sufficient consideration, and his claim might lawfully be provided for by the wife in making an assignment for the benefit of creditors. Romer v. Koch, 49 Hun, 483.

The General Term of the Superior Court sustained the judgment in this case entered upon the referee's report, holding that the assignment was invalid. In order to get a clearer view of the question, in regard to which two very learned and able courts entertain opposite and conflicting opinions, a clear understanding of the facts which underlie it is necessary, and they are practically undisputed. The assignor is the daughter of Henry T. Gillett, who died November 23, 1874, leaving a will in which his daughter, this defendant, then married, was named as the residuary legatee and devisee. It is found by the referee that Gillett, at the time of his death, was possessed of a large estate, and was then and for some years prior to that date engaged in partnership with his son-in-law, John G. Guenther, in carrying on the wholesale and retail rectifying and liquor business in the city of Buffalo under the firm name of Henry T. Gillett & Son. That Henry T. Gillett owned all the property and assets of the firm, his son-in-law being interested only in the profits, and being, under the arrangement, entitled to receive one-half of the same. After the death of Henry T. Gillett, the son-in-law, said John G. Guenther, as survivor, carried on the business in the same firm name until May 1, 1876, when, as such survivor, and also as executor of the will of his father-in-law, he assigned and transferred to his wife, the residuary legatee, by written instrument, "all and singular the goods, chattels, property, and effects of whatsoever name, kind, or character, or wheresoever situate of said firm of Henry T. Gillett & Son." The wife assumed all the debts of the firm, and released her husband from all claims on account of past transactions, and having thus become possessed of the firm property and a considerable estate left by her father, she employed her husband, who had no property of his own, to take charge of and carry on the wholesale and retail rectifying and liquor business for her under the old firm name of Henry T. Gillett & Son. And she also further agreed with her husband that she would assume and pay all the expenses of supporting the family. She also, on the 1st day of May, 1876, executed, acknowledged, and procured to be recorded in the office of the clerk of the county a certificate, pursuant to the statute permitting the continued use of partnership names, stating that she was the person "now and hereafter" dealing under the firm name of Henry T. Gillett & Son; that her residence or place of abode was in Buffalo, and that her husband, John G. Guenther, was her agent for carrying on said business. The business was conducted by the husband under this power and in this manner until May 9, 1883, the day after the date of the assignment which is the subject of this controversy. During all this time the management and conduct of the business was wholly intrusted to the husband. The wife was without business experience, and had no knowledge of the details of the business, or the methods by which it was carried on, or whether profitable or not. She agreed to pay her husband \$1,600 per year for his services, and the referee finds that this was a reasonable compensation. It is also found that during the time the husband had charge of the business the expenses of supporting the family, consisting of the husband, wife, and one child, in a proper and reasonable manner, not including the expense of maintaining the dwelling-house and repairing and insuring the same, amounted to between \$2,000 and \$2,500 per year, which was paid by the husband out of the proceeds of the business. The amount drawn by the husband during this time from the business to pay the family expenses amounted to upwards of \$10,000, and to apply upon his salary \$2,031.38. When the assignment in question was made the assignor was indebted to divers parties in the sum of \$70,000 and upwards, which she was unable to pay. The assignee, acting in good faith and, as is found, without any fraudulent intent, took possession of the property embraced in the assignment, having duly qualified, and he claims the property as such assignee for the purposes of the trust. Numerous other facts were found relating to the origin, history, and validity of the mortgage which the referee held to be valid, and as all parties seem to have acquiesced in that part of the decision, we are not concerned with it on this appeal. The referee held that the promise and agreement of the wife to support the family was void, and that as the husband had drawn from the business in all over \$12,000, there was nothing due to him for salary from the wife, and "that by

reason of such preference and the directions to said assignee, so contained in said assignment, to pay to said John G. Guenther out of said assigned property and estate said sum of \$7,000, said assignment is void." It thus appears that the conclusion that the assignment was void, and the preferred claim of the husband without consideration, was reached by the referee by applying the \$10,000 and upwards which the husband drew from the business to pay the family expenses, under a void agreement, upon his salary, thus extinguishing any claim against the wife for the same. We think that the judgment proceeds upon an erroneous view of the transaction. The assignor, upon the death of her father, became possessed of a separate estate, and entered upon the conduct of a separate business, which she could manage or carry on either personally or through such agencies as she might select, and for that purpose it was competent for her to appoint Abbey v. Deyo, 44 N. Y. 348; Buckley v. Wells, ber husband. 83 id. 518; Knapp v. Smith, 27 id. 278; Merchant v. Bunnell, 3 Keyes, 539; Foster v. Persch, 68 N. Y. 400; Kingman v. Frank, 33 Hun, 471.

The right to employ an agent implies the right to compensate him for his services, and even if it be assumed that the husband would be unable to maintain an action against the wife to recover the agreed compensation, it would still remain a moral obligation which the wife could voluntarily pay or provide for without furnishing any legal or just ground for complaint on the part of her other creditors, providing the transaction was free from actual fraud. So, too, her agreement to support the family in this case was, no doubt, illegal and perhaps void, in the sense that so long as it remained executory it could not be enforced against her, but as she entered into the agreement when she was perfectly solvent and without any fraudulent intent, she had the right to perform it, and having done so could not undo what had been done by recalling what she had paid or requiring the husband to reimburse her for the outlay. This was the situation in which the assignor was placed before making the assignment. She had performed her agreement to support the family by permitting the husband to pay these expenses out of her funds, but she had not paid the yearly salary which she had stipulated to pay, and it was not a fraud upon her other creditors to provide for its payment in the assignment. We do not consider it necessary to state at greater

length the reasons or refer more particularly to the authorities that uphold this proposition. That has been done by the Supreme Court in Romer v. Koch (supra), in a learned and able opinion which commands our approval. There is nothing in this view of the case that conflicts with Coleman v. Burr, 93 N. Y. 17. In that case the husband agreed to pay his wife a specified sum per week for taking care of his aged mother whom he was bound to support, and this agreement, honestly made, was the sole consideration for the transfer by the husband to his wife of certain It was held that this conveyance was void as against the existing creditors of the husband. This result was reached by the application of the common-law doctrine that the marital duty of the wife required her to perform such duties when necessary in the household of her husband, and a contract on the part of the husband to pay her for the performance of such duty was without consideration. That principle has no application here, as it has not yet been held and is not claimed that a husband owes any legal duty to his wife to render services for her, in her separate business, without compensation.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

BODINE v. MATILDA KILLEEN.

(53 N. Y. 93. Court of Appeals of New York, 1873.)

Contract between Husband and Wife. — Husband as Wife's agent. — Estoppel of Wife.

ALLEN, J. With the removal of common-law disabilities from married women, corresponding liabilities have necessarily been imposed upon them. They take the civil rights and privileges conferred, subject to all the incidental and correlative burdens and obligations, and their rights and obligations are to be determined by the same rules of law and evidence by which the rights and obligations of the other sex are determined under like circumstances. To the extent, and in the matters of business in

which they are by law permitted to engage, they owe the same duty to those with whom they deal, and to the public, and may be bound in the same manner as if they were unmarried. Their common-law incapacity cannot serve as a shield to protect them from the consequences of their acts, when they have statutory capacity to act.

A married woman is sui juris to the extent of the enlarged capacity to act conferred by statute, and may be estopped by her acts and declarations, and is subject to all the presumptions which the law indulges against others with full capacity to act for them-Sherman v. Elder, 24 N. Y. 381. Where there is no legal capacity to contract, a party will not be estopped by falsely representing that he has capacity; that is, the incapacity is not removed by any fraudulent representation of the actor. will not permit one legally incapacitated to do that indirectly which he or she cannot do directly. That is especially the case in respect to infants and married women laboring under the common-law disabilities, the law imposing the disqualification from motives of public policy, and for the safety of those regarded as weak, and needing this protection. Keen v. Coleman, 30 Penn. 299; Lowell v. Daniels, 2 Gray, 161; Goulding v. Davidson, 26 N. Y. 604. But the reason of the rule ceasing with the removal of the incapacity, the rule falls. In the management and control of her separate property, when acting by agents, a feme covert is answerable for the frauds of her agent while acting within the scope of the agency, although the fraud may be without her knowledge or assent. Baum v. Mullen, 47 By statute (Laws of 1860, chap. 90) a married N. Y. 577. woman may carry on any trade or business on her sole and separate account, and the earnings from her trade or business are her sole and separate property, and she may sue and be sued in all matters having relation to her sole and separate property, in the same manner as if she were sole. She has all the legal capacity to do every act incident to the business or trade in which she may engage which a feme sole would have, that is, full legal capacity to transact the business, including, as incidents to it, the capacity to contract debts and incur obligations in any form, and by any means, by which others acting sui juris can assume responsibility.

This defendant, for many years prior to May, 1869, had been

doing business in New York city as a retail grocer, buying her goods of the plaintiffs on credit. During most of the time, and until some time in the year 1868, her husband had acted as her agent in making the purchases and payments. The husband was taken ill in 1868, and from that time she made the purchases and payments to the plaintiffs, but there was no revocation of the agency of the husband. About the first of May she transferred the business to her husband, who subsequently carried it on at a different place in the same city, and bought the bills of goods, for which action is brought, during the month of May. The jury have found that there was no notice to the plaintiffs of the change in the business, and that they had no knowledge of it. Credit was in fact given to the defendant, and not to her husband. The plaintiffs had the right to presume that the business of the defendant, and the agency of her husband in respect to it, continued until actual notice of change in the business, and a revocation of the agency. Suffering the plaintiffs to act upon this presumption, she is estopped from alleging the contrary. She had capacity to continue the business in which she had been engaged. and whether she expressly represented to the plaintiffs that the business was still hers and her husband was her agent, or the facts were legally and naturally inferable from her acts or her silence, is immaterial. She is bound by the appearances which she has given to the transaction, and upon the faith of which others have acted, up to the limits of her legal capacity to act. In other words, to the extent of her legal capacity, the apparent authority of the husband to act for and bind her must be taken as the real authority, so far as others have been induced to act upon it, and have parted with their property upon the faith of it. It is simply because the defendant had the power to contract the debt for which this action is brought, that she may be estopped by her acts from disputing her liability, and the existence of this capacity takes the case out of the principle of the authorities relied upon by the counsel for the appellant. This is the only question presented by the record, or urged by the appellant, although it is made the subject of several exceptions in different forms upon the trial. The case was well disposed of at the circuit.

The liability of the defendant does not depend upon the fact that she was actually carrying on a business or trade on her sole and separate account, but upon her capacity to do so, with the other circumstances establishing her liability.

The judgment must be affirmed. All concur.

Judgment affirmed.

NOEL v. KINNEY.

(106 N. Y. 74. Court of Appeals of New York, 1887.)

Partnership between Husband and Wife. — Purchases for benefit of Wife's separate property. — Estoppel of Wife.

DANFORTH, J. The action is upon a note signed "J. P. Kinney & Co.," payable to the order of plaintiff at bank for \$505, value received. The complaint contains allegations usual in such cases, and sufficient to charge the defendants, as partners, under the name affixed to the note. Frederica M. Kinney alone answered, and her sole defence is, that at the time stated she was a married woman, and that the note was executed and delivered by her husband; there is, however, no allegation that it was made without her knowledge and consent, nor that it was made without her authority. Upon the trial the plaintiff put the note in evidence, and the defendant proved her marriage with the other defendant. There was evidence from which the jury might have found that she was the owner of improved real estate in the city of Brooklyn; that the consideration of the note was the purchase-price of mirrors placed in houses built upon her land, and that the mirrors were unpaid for. The note was fairly taken, and the consideration delivered upon the representation by the husband that the wife was the sole owner of the property, and that the name of J. P. Kinney & Co. was used as mere matter of convenience in transacting her It does not appear that there was any business except in relation to the houses. No question was made as to the authority of defendant's husband to execute the note, nor as to the truth of his representations.

The defendant Frederica moved to dismiss the complaint upon the ground that, as to her, the note was invalid; "its form," as her counsel stated, "showing it was not given in respect to her separate business or estate." The trial judge directed a verdict for the plaintiff subject to the opinion of the court. It was so rendered, but, on motion of the defendant's counsel, afterwards set aside by the same judge, and judgment ordered for the defendant. Exceptions taken by the plaintiffs to this ruling were directed to be heard in the first instance at General Term, judgment in the mean time to be suspended. The General Term overruled the exception and ordered judgment for the defendant.

It is obvious that the contract, in fulfilment of which the note was given, was of value to the defendant, for by it she acquired articles, for the improvement of her property. She retains those articles, and has so far avoided payment upon the ground that she and her husband, upon contracting and consummating marriage became one person, and so incapable of thenceforth contracting one with the other; that therefore they could not be partners, and, as the contract sued on was in form a co-partnership contract, it could not be enforced against her. If this is the present rule of law, then the statutes which enable the woman to acquire and hold property, to bargain, sell, assign, and transfer it, to carry on any trade or business and perform any labor or service on her own account, and which protect her in the enjoyment of her earnings, from her trade, business, labor, or services, and permit her to use and invest these earnings, are effectual only so far that she may alone or jointly with any person or persons, save her husband, derive profit and increase from her work and gain from the use of her estate. If they are to be so limited in her favor, they may easily, as in this instance, become not merely enabling statutes for her benefit, but also, in her hands, instrumentalities of fraud.

Upon the precise question presented, the opinion of the court below assumes that the decisions of other courts are conflicting; but we are referred to no case in this court where a woman has successfully asserted her coverture as a defence to an action for the price of goods purchased by her, and I am unable to see why, as against creditors, she should be permitted to interpose the mere form of her promise as an obstacle to their recovery. It is settled that the things, which the statutes above referred to permit her to do in person, she may also do by another as her agent. This is necessarily so, for she is allowed to act in respect to them as if unmarried; and it cannot be doubted that the improvement of her land or the management of her personal prop-

erty, whether for preservation or business, may be conducted by her by means of any agency which any other owner of property might employ, and that the produce and increase thereof will be hers. Knapp v. Smith, 27 N. Y. 277, 278; Abbey v. Deyo, 44 id. 343, 344. So she may do those things through her husband as her agent. Abbey v. Deyo, supra; Rowe v. Smith, 45 N. Y. 230. She may also have such a community of interest with him in relation to real estate as will render her liable for his frauds relating to it, and when he, professing to act as her agent, makes false representations, although without her knowledge, and she receives the proceeds, she cannot retain the fruits of his fraud. Krumm v. Beach, 96 N. Y. 398.

Again as to all contracts relating to her separate estate, or made in the course of her separate business, she stands at law on the same footing as if unmarried, and can, therefore, make negotiable paper which will be governed by the law merchant, and can be sued upon in the ordinary way by general complaint, and without special statements. Frecking v. Rolland, 53 N. Y. 422. Nor can she escape liability because she and her husband are joint makers of the note sued on. In Frecking v. Rolland (supra) the action was on a joint promissory note signed by the defendants, who were husband and wife. He set up usury, and she set up The court directed a verdict for the wife, and the jury gave a verdict against the husband. The creditor appealed. The General Term affirmed the verdict in favor of the wife, and the creditor appealed to this court. Against the appeal it was argued (1st) that being a married woman she was not liable for the note in suit; (2d) that the complaint, being general and not specific, was insufficient to charge her property. Neither objection prevailed, and the judgment in her favor was reversed. There the husband, acting for himself and as the agent of his wife, borrowed money with which to pay for a factory bought by her. The money was loaned to them, and was in part so applied. The note was given for the money loaned and for services. The court, in answering the defendant's objections, show that the capacity of a married woman to make contracts relating to her separate business is incident to the power to conduct it, since the latter would be barren and useless if disconnected with the right to conduct it in the way and by the means usually employed. In the case cited she became a joint contractor with her husband, but she was as

much bound to perform the joint engagement as if the undertaking had been several, and she did not escape liability because her joint contractor was her husband. It was not necessary to inquire in that case whether the one paying could obtain contribution from the other, nor is it necessary to go into that question here. In that case both undertook to pay the creditor; in this case both undertake to pay the creditor. Can it make a difference in the measure of liability that in one case the married woman entered in her own name and her husband in his name in the execution of a joint obligation, and in the other case adopted a name which represents a joint liability, which may in effect also be several? Partners are at once principals and agents — each represents the other — and if in the relation of partnership there are obligations which a married woman cannot enforce against her husband, or the husband against the wife, they involve no feature of the present action, which asserts only the obligation of a debtor to discharge her debt, or the obligation of a promisor to fulfil her promise.

More like the present case is that of Scott v. Conway, 58 N. Y. 619, where, in an action for the price of labor and materials supplied to a theatre carried on by Sarah G. Conway and her husband Frederick B., under the name of "Mrs. F. B. Conway's Brooklyn Theatre," and in which the wife and husband were jointly interested, it was held to be no defence against one who dealt with her in ignorance of the partnership, that she had a dormant partner, and that the rule was not changed by the fact that the partner was her husband.

In Bitter v. Rathman, 61 N. Y. 512, it was held that a married woman, who in secret trust for her husband becomes a member of a co-partnership, is to be regarded as the owner of the interest she represents, and might maintain an action for the dissolution of the co-partnership and for an accounting. The defendant in that case denied that she was a partner, and asserted that he alone was interested in the business, claiming that being a married woman she could not in law be his partner. The court held otherwise, and also that, having suffered herself to be regarded by the public as a partner, she was liable as such to the creditors of the ostensible firm, although it might be otherwise in respect to her husband and his creditors. It would seem, therefore, that by becoming a partner either with a husband or another person a

married woman loses no right of property. And no principle is suggested upon which her estate can be increased at the expense of creditors, nor how either in her own name or in her own name and that of another, or with another, she can purchase goods on credit to the advantage of her separate estate and not become liable for its payment. In Coleman v. Burr, 93 N. Y. 17, cited by the appellant, the sole question was whether the conveyance of property by the husband to his wife was sustained by a consideration good as against his creditors, who impeached it. Here the wife was as capable of contracting as if she had been unmarried, as capable of adding to her estate by fresh acquisitions, and she should not be permitted to escape payment or performance by joining to her own name that of her husband, or by combining the two into a firm or partnership name. It was by that name she chose to contract, and as between herself and creditors she is bound by it. Individuals may be liable as partners to third persons, while as between themselves they are not. Here, then, the question is not between husband and wife. Assume that as to and with him she has no capacity. It by no means follows that she shall not be held upon a contract made by him upon a consideration moving to her, where a third person, who parted with that consideration in reliance upon the husband's apparent, and which turns out to have been a real agency, seeks to enforce the contract. If the adoption of a firm name was a mere contrivance to carry on the business jointly, and at the same time put the property acquired and added to the wife's separate property out of the reach of creditors dealing with either bond fide as the partner of the other, it should not be permitted to have that effect. If, as the testimony shows, the wife was the sole owner of the property, that the husband had no interest in it, but that for convenience they were doing her business in the name of J. P. Kinney & Co., her liability for a debt contracted in that name is entirely consistent with the fact, if it be a fact, that as between the parties themselves no partnership exists. This is so, although the plaintiff alleges in the complaint that the defendants are partners, and that allegation is not denied. For the purposes of the action it may be true. The plaintiff gave credit to them as such, but the goods he sold were intended by them to be annexed to the wife's separate estate, and they were so annexed. If the arrangement was valid between all parties there

is no pretence of a defence. If invalid only as between the defendants, the wife, who received the fruits of the transaction, cannot as against a creditor assert its invalidity. Although married she may be estopped by her acts and declarations in any matter in respect of which she is capable of acting sui juris. Killeen, 53 N. Y. 93. In this instance the plaintiff proved the contract, that it was made by her authorized agent, and that it had reference to the improvement and benefit of her separate estate. She had capacity to do all these things, and if the arrangement which led to the use of her husband's name as joint promisor or partner, was beyond her power to enter into, she must meet that liability without regard to any question whether her husband is also liable, or as to what rights of indemnity or otherwise she might have against him. She was a principal and he was her agent. He neither exceeded his power nor were his acts to her prejudice, and if by reason of any technical incapacity they could not contract with each other, or together, as constituting that artificial entity, a firm or co-partnership (a question we do not decide), she is liable, and the contract enforceable against her in favor of the plaintiff whose property has been added to her estate upon the strength of a promise made in her name by her authorized agent.

We think the court erred in directing judgment for the defendant. It should be reversed and the plaintiff have judgment upon the verdict.

All concur.

Judgment accordingly.

KAUFMAN v. SCHOEFFEL.

√ (87 Hun, 140. Supreme Court of New York, 1885.)

Partnership between Husband and Wife.

HAIGHT, J. This action was brought by the plaintiff, as executor, etc., to recover for the conversion of certain personal property alleged to belong to the estate of Mary J. Kaufman, deceased. The defence was that the taking complained of was under an execution issued on a judgment in which the plaintiff, individ-

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ually, was judgment debtor, and that Mary C. Kaufman was his wife, and that they were engaged in business as copartners; that the property taken was copartnership property, and that on her death the same passed to him, as survivor, and that consequently he could not maintain the action as executor. Upon the close of the plaintiff's evidence the court held that the evidence established that they were copartners and that the property was copartnership property, and that the defendant's motion for a nonsuit should be granted.

The question thus presented is as to whether or not a husband and wife can legally enter into a business copartnership. This question has recently received consideration in the case of Fairlee v. Bloomingdale, 67 How. 292, in which it was held that such copartnership is not authorized by the statute, and that the common-law disability of husband and wife to so contract together still exists. It was again considered in the case of Graff v. Kinney, 1 How. U. S. 59, in which the opposite result was reached. And, again, in the case of Noel v. Kinney, 31 Alb. L. J. 328, in which the decision in the case of Graff v. Kinney was criticised and disagreed with, and the decision in the former case concurred in. So far as we have been able to discover, the precise question has not been passed upon in the General Term or the Court of Appeals.

In the case of Nash v. Mitchell, 71 N. Y. 199, 294, ALLEN, J., in delivering the opinion of the court, says: "The disabilities of a married woman are general and exist at common law; the capabilities are created by statute and are few in number and exceptional. It is for him who asserts the validity of a contract of a feme covert, by evidence to bring it within the exceptions." In the case of Bertles v. Nunan, 92 N. Y. 152, 160, EARL, J., in delivering the opinion of the court, says: "The common-law incidents of marriage are swept away only by express enact-The ability of the wife to make contracts is limited. Her general engagements are absolutely void, and she can bind herself by contract only as she is expressly authorized to do so by statute. A husband still has his common-law right of tenancy by the curtesy," . . . and "that the common-law disability of husband and wife, growing out of their unity of person, to convey to each other still existed. It is believed also that the common-law rule as to the liability of the husband for the torts

and crimes of his wife are still substantially in force." In this case it was held that under a conveyance to a husband and wife jointly, they take not as tenants in common, or joint tenants, but as tenants by the entirety, and upon the death of either the survivor takes the whole estate. In the case of Coleman v. Burr, 93 N. Y. 17, it was held that the statute authorizing a married woman to carry on a trade or business and to perform any labor or services on her sole and separate account, did not absolve her from the duty to render to her husband such services in his household as are commonly expected of a married woman in her station in life. In the case of Johnson v. Rogers, 35 Hun, 267; 20 Weekly Digest, 568, this court has held that a deed made by a husband to his wife directly, for a mere nominal consideration, passes no legal title.

At common law, by reason of the unity of husband and wife, they cannot contract together a business copartnership. disability still continues unless it has been changed by the statute. The question, therefore, becomes one of construction of the statutes. And in such construction we must not forget the rule that statutes in derogation of the common law must be strictly constructed. The statute in question is as follows: "A married woman may bargain, sell, assign, and transfer her separate personal property, and carry on any trade or business, and perform any labor or services on her sole and separate account, and the earnings of any married woman from her trade, business, labor, or services, shall be her sole and separate property and may be used or invested by her in her own name." Sec. 2, chap. 90, Laws of 1860. It is claimed that the phrase "on her sole and separate account," does not limit or qualify the words "trade or business," and that this is apparent from the punctuation of the sentence. This, however, does not appear to us to be the construction of the section intended. In construing statutes it is not a safe rule to place too much reliance upon the punctuation. The words "trade or business" are connected with the words "labor and services" by the conjunction "and," and it appears to us that the phrase "on her sole and separate account" refers back and qualifies the words "trade or business," as well as the words "labor or services." It reads, "a married woman may carry on any trade or business and perform any labor or services on her sole and separate account." In other words, a married woman may carry on any trade or business on her sole and separate account. That this is the meaning intended would seem to follow from that which precedes and follows the sentence. The section preceding the one under consideration provides that the property which a married woman acquires "by her trade, business, labor, or services, carried on or performed on her sole and separate account," etc., shall be and remain her sole and separate property. The phrase "on her sole and separate account," in this section, unquestionably refers back and limits or qualifies the words, "trade, business, labor, or services," and this is evident from the phrase "carried on or performed." The words "carried on" refer to her trade or business, and the word "perform" to her labor or services. To the same effect is the concluding portion of the sentence which follows that under consideration.

If we are correct in this reading of the section, it follows that a married woman cannot enter into a copartnership with her husband and carry on a trade or business.

Again, it is argued that it has been held that a married woman may engage in a copartnership business with a person other than her husband, and that this construction of the section would be in conflict with such decisions. This, we do not think would necessarily follow. The married woman was disqualified from engaging in business by reason of the existence of her husband. By her marriage her person was united with that of her husband, and they thereafter were regarded in law as one person. She could not contract separate and distinct from him. As soon as the husband died her disability was removed. In using the words, "sole and separate," in the statute under consideration, the legislature doubtless had in mind the husband, and these words were doubtless intended to refer to him and to him only. The legislature, by chapter 381 of the laws of 1884, has now removed the disability of a married woman to contract, and she may now contract to the same extent and with like effect and in the same form as if unmarried; but it is expressly enacted that this act shall not affect or apply to any contract that shall be made between husband and wife, thus recognizing and continuing the construction that we have given.

On the trial, the plaintiff was sworn as a witness in his own

behalf, and gave evidence as to the articles taken, their value, etc. On the cross-examination by the defendant, he testified that Mary J. Kaufman and himself were members of the firm, and that the goods were a part of the stock-in-trade. On the redirect-examination he was asked the following question: "You say you were a member of the firm: state what the agreement was between you and your wife in relation to your becoming a member of the firm?" This was objected to, and the plaintiff's counsel offered to show the relation existing between Mary J. Kaufman and the witness at the time his name was used in the firm, based upon an agreement made at that time between them, in substance as follows: that Mary J. Kaufman requested the witness to permit her to use his name as the company, and agreed to remunerate him for its use; that he was not to become a copartner as between themselves, or have any interest in the copartnership property. This was objected to, and the objection sustained, and exception taken by the plaintiff's counsel. We are of the opinion that this was error. The evidence offered was proper in rebuttal, as tending to explain or disprove that drawn out upon the cross-examination. The plaintiff had the right to show that the agreement actually made between the witness and Mary J. Kaufman did not, in law, constitute a copartnership.

Judgment reversed, and a new trial ordered, with costs to abide the event.

SMITH, P. J., BARKER and BRADLEY, JJ., concurred.

Judgment and order reversed, and a new trial ordered, with costs to abide the event.

LORD v. PARKER.

(3 Allen, 127. Supreme Judicial Court of Massachusetts, 1861.)

Partnership between Husband and Wife.

HOAR, J. The plaintiff in review was one of several defendants in the original action, and she alone petitioned for a review; and the writ of review issued in her name only. The objection that the other defendants should have been joined is met by the

express provision of the statute. Rev. Sts. c. 99, § 16; Gen. Sts. c. 146, § 36.

The original action was upon two promissory notes dated November 8, 1857, and signed by J. H. Lord & Company, a partnership carrying on the business of manufacturers of earthenware in Boston; and the plaintiff in review was sued as one of the copartners. She is a married woman, and was married to Joseph H. Lord, November 14, 1855. The lease and contract, by virtue of which it is contended that she was liable as a partner, are dated June 1, 1857. The alleged copartnership was with her husband, Joseph H. Lord, and three other persons, who were joined as co-defendants.

The learned judge who presided at the trial ruled that the plaintiff in review was not liable in the suit, and reported the case for the decision of this court. The construction of the contract relied upon to sustain the action is not free from difficulty, and it has been argued in her behalf that it would not have made her liable as a partner, if her capacity to enter into a partnership were unquestioned. But we have not found it necessary to pursue that investigation, because the result to which the court have come upon the interesting and more general question which the case presents, has rendered it immaterial.

That question is, whether it is in the power of a married woman, under the laws of Massachusetts, to form a copartnership with her husband and other persons, with all the consequences and liabilities incident to that relation? If she has this power, it is because it has been expressly conferred by statute. defendant in review relies upon St. 1855, c. 304, §§ 3 and 7, and St. 1857, c. 249, § 2. These statutes have made very great and important changes in the law relating to the rights of married women, their capacity to sue and be seed, and of holding, managing, and disposing of property. The St. of 1855, c. 304, § 3, provides that "any woman hereafter married may, while married, bargain, sell, and convey her real and personal property, and enter into any contract in reference to the same, in the same manner as if she were sole," with an exception as to real estate and shares in corporations, not material to this inquiry. Section 7/1s as follows: "Any married woman may carry on any trade or business, and perform any labor or services, on her own sole and separate account; and the earnings of any married woman, from

her trade, business, labor or services, shall be her sole and separate property, and may be used and invested by her in her own name; and she may sue and be sued as if sole in regard to her trade, business, labor, services, and earnings; and her property, acquired by her trade, business, and service, and the proceeds thereof, may be taken on any execution against her."

The St. of 1857, c. 249, § 2, provides that "any married woman may, while married, bargain, sell, and convey her real and personal property, which may now be her sole and separate property, or which may hereafter come to her by descent, devise, bequest, or gift of any person except her husband, and enter into any contract in reference to the same, in the same manner as if she were sole," with a similar exception as in the former statute as to real estate and shares in corporations.

The title of these acts is "An Act," and "An Act in addition to an act to protect the property of married women." Their leading object is to enable married women to acquire, possess, and manage property, without the intervention of a trustee, free from the interference or control, and without liability for the debts, of their husbands. They are in derogation of the common law, and certainly are not to be extended by construction. And we cannot perceive in them any intention to confer upon a married woman the power to make any contract with her husband, or to convey to him any property, or receive any conveyance from him. power to form a copartnership includes the power to create a community of property, with a joint power of disposal, and a mutual liability for the contracts and acts of all the partners. To enter into a partnership in business with her husband would subject her property to his control in a manner hardly consistent with the separation which it is the purpose of the statute to secure, and might subject her to an indefinite liability for his engagements. The property invested in such an enterprise would cease to be her "sole and separate" property. The power to arrange the terms of such a contract would open a wide door to fraud in relation to the property of the husband. The property which a married woman may acquire and dispose of by St. 1857, includes such as may come to her "by gift of any person except her husband," clearly indicating that a gift from him was not to be recognized as creating any title to property in her. If she could contract with her husband, it would seem to follow that she

could sue him and be sued by him. How such suits could be conducted, with the incidents in respect to discovery, the right of parties to testify, and to call the opposite party as a witness, without interfering with the rule as to private communications between the husband and wife, it is not easy to perceive; and the consequences which would follow in respect to process for the enforcement of rights fixed by a judgment, arrest, imprisonment, charges of fraud, proceedings in invitum under the insolvent laws, and the like, are not of a character to be readily reconciled with the marital relation. We cannot suppose that an alteration in the law involving such momentous results, and a change so radical, could have been contemplated by the legislature, without a much more direct and clear manifestation of its will. And we are all of the opinion that the plaintiff in review could not form a copartnership such as was relied on to maintain the original action against her, and therefore was not bound by a note given in the name of the firm of J. H. Lord & Co.

A similar construction has been given, by the supreme judicial court of Maine, to the general language of statutes which might, in their literal acceptation, have permitted suits between husband and wife, or allowed them to testify for or against each other. Smith v. Gorman, 41 Maine, 405; McKeen v. Frost, 46 Maine, 239; Dwelly v. Dwelly, Ib. 377.

The plaintiff in review is entitled to a judgment upon the verdict, reversing the original judgment against her, with costs; and leaving that judgment in force only against the other original defendants.

- G. S. Boutwell, for the plaintiff in review.
- N. T. Dow, for the defendant in review.



SUAU v. CAFFE.

(122 N. Y. 808. Court of Appeals [Second Div.], of New York, 1890.)

Partnership between Husband and Wife.

FOLLETT, Ch. J. But a single question is involved in this appeal, which is whether a married woman who contracts a debt with her husband in a business carried on for their joint benefit

can avoid liability for it on the ground of coverture. The second section of chapter 90 of the Laws of 1860, provides that: "A married woman may . . . carry on any trade or business . . . on her sole and separate account." It is urged that this language is not broad enough to authorize married women to engage in business as partners or jointly with others, or at least with their husbands, but that the statute simply confers power on them to contract by themselves and apart from others. This construction is too narrow, and fails to express the evident intent of the legislature, which was not to prescribe the mode in which married women should carry on their business, but to free them from the restraints of the common law, and permit them to engage in business in their own behalf as free from the control of their husbands as though unmarried. Before this statute, the profits of their business belonged to their husbands, and the words "sole and separate account" were intended to convey the idea that the beneficial interest of any business in which they might engage belonged to them and not to their husbands. Since the enactment of this statute it has been held that husbands and wives may legally contract with each other in reference to their separate estates, Owen v. Cawley, 36 N. Y. 600; Bodine v. Killeen, 53 id. 93; that they may become agents for each other, Knapp v. Smith, 27 N. Y. 277; and that a husband may assign to his wife a chose in action, Seymour v. Fellows, 77 N. Y. 178.

In Frecking v. Rolland, 53 N. Y. 422, it was held that a wife could not escape liability on a joint promissory note given by herself and her husband in payment for property purchased by her by reason of her coverture, nor by reason of the fact that she contracted jointly with her husband.

In Scott v. Conway, 58 N. Y. 619, the defendant and her husband were engaged in running a theatre under the name of "Mrs. F. B. Conway's Brooklyn Theatre," pursuant to a contract by which the profits and losses were to be equally shared between them. To an action brought for the recovery of the value of goods sold, the wife interposed the defence that she was not liable for the debt, because it was not contracted in any trade or business carried on for her sole or separate account or benefit, but for the benefit of a business carried on by herself and husband for their joint benefit. This defence was overruled in the Supreme Court and in the Court of Appeals.

Bitter v. Rathman, 61 N. Y. 512, was an action for an accounting between partners. The plaintiff, a married woman, had been engaged in business with the defendant under the name of H. Rathman & Co. The trial court found "that the plaintiff, in secret trust for her husband, was the partner of the defendant," and that "in respect to the public she was to be regarded as the real partner," and ordered an accounting as to the partnership affairs. GRAY, Commissioner, said: "Yet she, having suffered herself to be regarded by the public as a partner, was liable as such to the creditors of the ostensible firm; and having thus exposed herself to such liabilities, if any should be found to exist, she had to any such extent no right, as against either the defendant or her husband, to be protected out of the share which would belong to her in her capacity as trustee for her husband, at whose instance she undertook the trust." This case does not decide that a wife may or may not be a partner in business with her husband, but it, in effect, decides that a married woman may be a partner with a third person, and that her husband may act as her agent in the business of the firm.

In Noel v. Kinney, 106 N. Y. 74; 15 Abb. N. C. 403, an action was brought against the husband and wife on a note signed "J. P. Kinney & Co.," payable to the plaintiff. The complaint charged that the defendants were liable as partners under the name signed to the note. The husband made default, but the wife answered that she was a married woman, and that the note was executed by her husband. On the trial the plaintiff put the note in evidence, and it appeared that the defendants were husband and wife, and there was evidence that the note was given for mirrors placed in houses owned by the wife. A motion to dismiss the complaint on the ground that the note on its face showed that it was not given in respect to her separate business or her estate, was overruled. In considering this question Danforth, J., speaking for a unanimous court, said: "In the case cited, Frecking v. Rolland, 53 N. Y. 422, she became a joint contractor with her husband, but she was as much bound to perform the joint engagement as if the undertaking had been several, and she did not escape liability because her joint contractor was her husband. It was not necessary to inquire in that case whether the one paying could obtain contribution from the other, nor is it necessary to go into that question here. In that case both undertook to pay the creditor. Can it make a difference

in the measure of liability that in one case the married woman entered in her own name and her husband in his name in the execution of a joint obligation, and in the other case adopted a name which represents a joint liability, which may, in effect, also be several? Partners are at once principals and agents — each represents the other — and if in the relation of partnership there are obligations which a married woman cannot enforce against her husband, or the husband against the wife, they involve no feature of the present action, which asserts only the obligation of a debtor to discharge her debt, or the obligation of a promisor to fulfil her promise."

Partners are the agents of each other, and are jointly and severally liable for the debts of the firm, these being two of the essential elements of a contract partnership. It being settled that husbands and wives may be the agents of each other, and that they may bind themselves by joint contracts entered into with third persons, we see no warrant in the statute for exempting them from liability to creditors for debts incurred by firms of which they are members. It has been so held in Graff v. Kinney, 37 Hun, 405; 15 Abb. N. C. 397; Zimmermann v. Erhard, 8 Daly, 311; 83 N. Y. 74. Opposed to these are Chambovet v. Cagney, 3 J. & S. 474; Kaufman v. Schoeffel, 37 Hun, 140; Fairlee v. Bloomingdale, 67 How. 292; 14 Abb. N. C. 341; 38 Hun, 230.

Upon principle and authority, we think that when a husband and wife assume to carry on a business as partners, and contract debts in the course of it, the wife cannot escape liability on the ground of coverture.

The judgment should be affirmed with costs.

HAIGHT, J., dissenting. The complaint alleges that the defendants were copartners in trade, doing business under the firm name and style of George Caffe, and that the plaintiff loaned and advanced to them as copartners the money sought to be recovered in this action. The defendants were husband and wife. They answered separately, each denying the copartnership, and that any money was loaned to them as copartners, and the defendant Adele Marie alleged her marriage to the defendant George, and that she was, during the time mentioned in the complaint, his lawful wife. The question as to the existence of the copartnership was controverted upon the trial. The verdict was in favor

of the plaintiff, thus disposing of that question. The entire business was transacted by the defendant George Caffe, and the loans were made by him, the defendant Adele Marie taking no part. The plaintiff is the brother of the defendant Adele Marie, and knew of the relation existing between the defendants. He was at work, as he claims, for the firm upon a salary at the time the loans were made. There is no evidence constituting an estoppel on the part of the wife, and the sole question left for our determination is whether a wife can lawfully engage in a business copartnership with her husband and be bound by the contracts made by him as a copartner.

This question was considered in the case of Kaufman v. Schoeffel, 37 Hun, 140, in which it was held by the General Term of the fifth department, that the statute enabling a married woman to enter into contracts, and to carry on any trade or business, and perform any labor or services on her sole and separate account, did not authorize or empower her to enter into a copartnership with her husband for the purpose of carrying on a trade or business.

The question was also considered at about the same time in the case of Graff v. Kinney, 37 Hun, 405, in which the General Term of the second department reached the opposite conclusion, affirming 15 Abb. N. C. 397.

In the case under consideration Davis, P. J., of the first department, in disposing of the case, says: "In my individual opinion the decision in Kaufman v. Schoeffel, supra, is a correct determination of the law, as I think the contrary ruling is adverse to the spirit and intention of the Married Woman's Acts, which were to separate the estate of a married woman from that of her husband, and to completely establish its separate character during coverture, and not enable her to so commingle it in copartnership as to clothe him with the power and title which copartners possess in law." 25 Wkly. Dig. 296.

The question was previously considered in the case of Chambovet v. Cagney, 3 J. & S. 474, in which Sedwick, J., says that "the law has made such rules in respect of the relations of man and wife, that it would be inconsistent with those that they should become partners in business. There is no doubt that the various acts for the protection of a married woman's property have left her in many respects as the common law placed her, under the control and in the power of her husband. . . . Such a dominion

and control cannot be exercised by one partner in business over another without a change of those legal relations which have formed the important characteristic of a partnership. In case a wife has a separate property, although domestic circumstances may keep her home, or she may be kept there by the lawful exercise of the husband's power over her in a proper contingency, he will not have power to dispose of that property. If they are business partners he might legally keep her home and legally dispose of the partnership property at the place of business. I do not believe that the legislature contemplated such an incongruity of rights and duties which accompany the formation of business partnerships between husband and wife."

In the case of Zimmermann v. Erhard, 58 How. Pr. 11, Beach, J., in the New York Common Pleas, reached the conclusion that the wife may contract with her husband a valid business copartnership. His opinion, however, does not appear to have been concurred in by the remaining members of the court. Van Brunt, J., says, in disposing of the case, that he does not think it necessary to pass upon the question whether or not, if a married woman enters into a copartnership with her husband, she can avail herself of the defence of coverture, for the reason that such defence is personal to her, and she may avail herself of it or not, as she sees fit. Larremore, J., concurred in the result, but evidently not upon this question, for in the case of Jacquin v. Jacquin he reached the conclusion that the common-law relation of husband and wife had not been changed so as to permit a business copartnership between them. Noel v. Kinney, 15 Abb. N. C. 408, note.

The question was again examined in the case of Fairlee v. Bloomingdale, 67 How. Pr. 292, in which Westbrook, J., at Special Term, considers the question in an elaborate opinion, reaching the conclusion that business partnerships between husband and wife are not authorized by the statute, and that the conclusion of Beach, J., in the case of Zimmermann v. Erhard, supra, cannot be sustained and should not be followed. And to the same effect is the decision of the General Term of the City Court of Brooklyn, in the case of Noel v. Kinney, 15 Abb. N. C. 403.

In the case of Bitter v. Rathman, 61 N. Y. 512, the plaintiff was a married woman, and had been engaged in business as a copartner with the defendant under the firm name of Rathman

& Co. It was found that she was engaged as such copartner in secret trust for her husband, although she had furnished from her separate property the funds with which the copartnership business was carried on. A disagreement having arisen as between the copartners, she brought an action for a dissolution and an accounting. The defendant claimed that under the statute authorizing a married woman to carry on any trade or business and perform any labor and services for her sole and separate account, she was not empowered to enter into a partnership business in which she had no interest other than as trustee for another. The court, in answer to that claim, says: "All this may be conceded so far as it regards her husband and his creditors. As to the creditors of her husband, he, and not she, would doubtless be regarded the real partner. Yet, having suffered herself to be regarded by the public as a partner, she was liable as such to the creditors of the ostensible firm, and having thus exposed herself to such liabilities, if any should be found to exist, she had to such extent the right, as against either the defendant or her husband, to be protected."

In the case of Noel v. Kinney, 106 N. Y. 74, it was held that the defence of coverture did not protect the wife for a debt contracted for the improving of her real and separate estate, and for which she was bound to the same extent as if a feme sole; that she was estopped by her acts and declarations in the DANFORTH, J., in delivering the opinion of the court, says: "There was evidence from which the jury might have found that she was the owner of improved real estate in the city of Brooklyn; that the consideration of the note was the purchase-price of mirrors placed in houses built upon her land, and that the mirrors were unpaid for. The note was fairly taken, and the consideration delivered upon the representation by the husband that the wife was the sole owner of the property, and that the name of J. P. Kinney & Co. was used as mere matter of convenience in transacting her business. It does not appear there was any business except in relation to the houses. No question was made as to the authority of the defendant's husband to execute the note, nor as to the truth of his representations." In this case the question under consideration was held not to be involved, and the court expressly states that it is not decided.

But in the case of Hendricks v. Isaacs, 117 N. Y. 411, it does appear to us that the question was decided. ANDREWS, J., in delivering the opinion of the court, says: "The point on this appeal respects the right of the plaintiff to have the contract made with his wife enforced against her estate. The contract was void at law. The common-law doctrine that husband and wife could not contract with each other, has not been changed in this State by legislation respecting the rights of married women. The entire and absolute disability of married women to enter into any legal contract, which was a stubborn and inflexible principle of the common law, has, indeed, in some respects, been modified. She may now, under our laws, purchase real and personal property and carry on business on her own account, and, as incident to these rights, she may enter into contracts with third persons for the purchase and sale of property, or in the prosecution of her separate business, enforceable in a legal action to the same extent as though she was a feme sole. But the disability to deal with her husband, or to make a binding contract with him, remains unchanged. Contracts between husband and wife are invalid as contracts in the eye of a court of law to the same extent now as before the recent legislation. Yale v. Dederer, 18 N. Y. 265; White v. Wager, 25 id. 328."

In other States where the statute is similar to our own, it has been held that a husband and wife cannot enter into a business copartnership. Lord v. Parker, 3 Allen, 127; Lord v. Davison, Id. 131; Edwards v. Stevens, Id. 315; Plumer v. Lord, 5 id. 460-463; 7 id. 481; Bowker v. Bradford, 140 Mass. 521; Payne v. Thompson, 44 Ohio St. 192; Haas v. Shaw, 91 Ind. 384-390; Scarlett v. Snodgrass, 92 id. 262; Bassett v. Shepardson, 52 Mich. 3; Artman v. Ferguson, 40 N. W. Rep. 907. So much for the authorities bearing upon the question.

The statute provides that a married woman may bargain, sell, assign, and transfer her separate personal property, can carry on any trade or business, and perform any labor or services on her sole and separate account, and the earnings of any married woman from her trade, business, labor, or services shall be her sole and separate property, and may be used or invested by her in her own name. Laws of 1860, chap. 90, § 2.

The question is as to the construction of this statute, for at common law a husband and wife could not contract together a business

copartnership. The disabilities of a married woman to contract are general, and her capabilities are created by statute. They are few in number and limited. Her general engagements are void unless authorized. Nash v. Mitchell, 71 N. Y. 199-204; Bertles v. Nunan, 92 id. 152-160.

Prior to the act of 1884, to which we shall subsequently allude, she could not bind herself by contract, unless the obligation was created by her, in or about carrying on her trade or business, or the contract relates to or is made for the benefit of her separate estate, or intention to charge the separate estate is expressed in the instrument or contract by which the liability is created, or the debt was created for property purchased by her. S. C. Bank v. Pruyn, 90 N. Y. 250-254.

The statute alluded to does not absolve her from the duty to render to her husband such services in his household as are commonly expected of a married woman in her station in life. It was the purpose of the statute to secure to the married woman, free from the control of her husband, the earnings and profits of her own business and her own labor and services, carried on and performed on her own and separate account, which at common law would have belonged to her husband. Coleman v. Burr, 93 N. Y. 17-24; Johnson v. Rogers, 35 Hun, 270.

The words "on her sole and separate account" appearing in the statute must be held to limit and qualify the words "trade or business," as well as the words "labor or services." words "trade or business" are connected with the words "labor and services" by the conjunction "and," and the phrase "on her sole and separate account" evidently was intended to refer back and qualify the words "trade or business." So that the meaning is the same as if it read, that a married woman may carry on any trade and business on her sole and separate account, and perform any labor or services on her sole and separate account. The section preceding the one under consideration provides that the property which a married woman acquires "by her trade, business, labor, or services carried on, or performed on her sole and separate account," etc., shall be and remain her sole and separate property. The phrase "on her sole and separate account" in this section unquestionably refers back, and limits or qualifies the words "trade, business, labor, or services," and this is evidenced from the phrase "carry on or perform." The words "carry on" refer

to her trade or business, and the word "perform," to her labor or services. To the same effect is the concluding portion of the sentence, which follows that under consideration.

Whether or not a married woman may engage in a copartnership business with a person other than her husband, it is not necessary to now consider. If disqualified, it is by reason of the existence of her husband. By her marriage her person became united with that of her husband, so that in law they were regarded as one person. If the husband should die or the marriage be dissolved her disabilities would be removed. In using the words "sole and separate," the legislature doubtless had in mind the husband, and these words were evidently intended to refer to him.

We consequently are of the opinion that the common-law disability of a married woman to engage in a business copartnership with her husband still continues, and has not been removed by the statute. This view appears to be sustained by the more recent legislation on the subject. By chapter 381 of the Laws of 1884, it is provided "A married woman may contract to the same extent, with like effect and in the same form as if unmarried, and she and her separate estate shall be liable thereon whether such contract relates to her separate business or estate or otherwise, and in no case shall a charge upon her separate estate be necessary. This act shall not affect or apply to any contract that shall be made between husband and wife," thus specially excepting from the provisions of the act any right of the wife to contract with her husband. It consequently appears to us that the motion made at the close of the plaintiff's case to dismiss the complaint as to the defendant Adele Marie Caffe should have been granted, and that the exception to such refusal is well taken.

The judgment as to the defendant Adele Marie Caffe should be reversed, and a new trial granted with costs to abide the event, but the judgment as to the defendant George Caffe should be affirmed with costs.

VANN, PARKER, and Brown, JJ., concur with Follett, Ch. J., Potter and Bradley, JJ., concur with Haight, J., dissenting.

Judgment affirmed.

YALE v. DEDERER AND WIFE.

(18 N. Y. 265. Court of Appeals of New York, 1858.)

Contract of Wife as surety for Husband on a promissory note. — When her separate estate is bound.

Comstock, J. If we assume that the lands of Mrs. Dederer, the appellant, which the plaintiff seeks to charge as her separate estate, are held under a trust for her separate use, and if the trust was created since 1830, the judgment appealed from is erroneous for reasons depending on that assumption alone. By the law of uses and trusts, as revised in that year (1 R. S. pp. 728, 729), there can be no express trusts in lands except such as the statute (§ 55) authorizes, and, in respect to those, it is declared (§ 60) that "every express trust, valid in its creation (except as otherwise provided for), shall vest the whole estate in the trustees, subject only to the execution of the trust. The persons for whose benefit the trust is created shall take no estate or interest in the lands, but may enforce the performance of the trust in equity." Now, a married woman may be the beneficiary in any one of the trusts which the statute allows to be created, but, like other beneficiaries, her power is qualified by the section quoted. She cannot alienate or encumber the title, which is entirely in the trustee. As she takes "no estate or interest," she has nothing to dispose of either absolutely by a sale or contingently by a charge which may result in a sale. L'Amoureux v. Van Rensselaer, 1 Barb. Ch. R. 37; Noyes v. Blakeman, 3 Sandf. S. C. R. 531. The power to dispose of the accruing income under one of those trusts need not now be considered, because the decision under review requires the land itself to be sold in default of personal estate sufficient to pay the debt in question. Without regard, therefore, to incapacity resulting from coverture, Mrs. Dederer could not, on the assumption of a trust, thus dispose of her estate.

I incline to think, however, that we should not presume the existence of any trust, upon the case as it is presented to us. The appellant admits in her answer that she has separate estate, consisting of certain lots of land and personal property, sufficient to satisfy the demand which the plaintiff seeks to enforce. But she does not explain the nature of her interest or title; and the case made on the trial only shows that she owns three farms in the county of Chenango, without any statement as to the mode in which the estate was acquired or the character of the title by which she claims it. Mr. Dederer appears to have been joined in the suit as husband merely. The character of a trustee for his wife is not imputed to him, and no other party is brought before the court sustaining that relation.

In this posture of the case, I think we must assume that the appellant's title is legal and not equitable. Indeed, her admission, and the statement in the case, that she has a separate estate in lands, would, as we have seen, be false in fact and in law, if we take for granted the existence of a trust for her benefit created within the last twenty-eight years. Again, if the plaintiff sought to charge her separate equitable estate, the trustee having the title would be an indispensable party! We should expect, moreover, that the deed or instrument creating the trust would be set forth, in order that the court might determine whether its provisions are consistent with the attempt to charge the estate. For, although a married woman may charge or dispose of property held in trust for her separate use, it is well settled that she cannot do so in any manner or for any purpose inconsistent with the restraints which the author of the trust has seen fit to impress upon it. Jacques v. The Methodist/ Episcopal Church, 1 John. Ch. R. 450; s. c. on appeal, 17 John. 548. The fact found and admitted, that Mrs. Dederer has a separate estate, by no means requires an inference that the property is held under a trust. By the statutes of this State which had been in force several years before this suit was commenced (Laws of 1848, ch. 200, and of 1849, ch. 375), she could acquire and hold in actual possession and enjoyment a separate legal estate in lands or personal property. So, before those statutes were passed, and at the common law, she could hold such an estate in lands vested in interest, although not in actual enjoyment while the coverture remained.

Regarding, then, the appellant as the owner of the lands which are called her separate estate, without the intervention of any trust, the plaintiff's case is met by another difficulty. Do the

disabilities of coverture prevent her from disposing of or charging an estate in lands in which she has the legal and the whole title? Until the change which has been mentioned was made by the legislature in the law of trusts, there was a well settled doctrine that a married woman could deal with her separate estate as though she were a feme sole. But this doctrine was a pure creation of the Courts of Equity. Trusts for the separate use of married women were a marked although a beneficent innovation upon the rules of the common law. But when the Courts of Equity sustained their validity and recognized the wife's estate under them, it seemed to be a necessary result that she should have the power of disposition; and accordingly the power was conceded. In many of the adjudged cases, the exercise of this power has been spoken of as an appointment of the estate authorized by the deed or settlement in trust; but the settled doctrine now is, that she may dispose of or charge the estate in any manner and for any purpose not conflicting with the instrument under which she acquired it. Jacques v. Methodist Episcopal Church, supra, and cases cited. The right of disposition must, therefore, be referred to the right of property enjoyed independently of the husband, and not to the theory of appointment pursuant to a power conferred by the author of the trust. She might be restrained by the provisions of the trust deed or instrument; but if not so restrained, she acted as a feme sole in the disposition of her separate estate.

But the separate estates upon which the Courts of Equity engrafted these peculiar doctrines included necessarily only such rights and interests of the wife as would belong to the husband but for the limitation to her particular use. Such were personal estate, the rents and profits of lands during coverture, and the inchoate title which, by the birth of a child, the husband might acquire as tenant by the curtesy. As to all such interests, the assent of the husband to a separate use, duly manifested, or a direction to that effect by the donor of the estate, would give to the wife all the disposing capacity of a feme sole. But her own reversion in lands, when she owned them at the time of the marriage, was a legal estate descendible to her heirs, to which Courts of Equity did not and could not well apply the doctrines which have been stated. In reference to such an estate, she only had the disposing capacity which the common law or some enabling

statute allowed to her. She could divest her title and bar the descent to her heirs, in England only by a fine or recovery, and in this country only by a conveyance with certain solemnities of examination and acknowledgment. Her acquisition, through a trust, of equitable rights which at law would belong to the husband, manifestly could not enlarge her capacity to deal with estates which at law as well as in equity were entirely her own.

So an estate in fee might be conveyed directly to a woman after marriage, to her sole and separate use. In such a case, equity would convert the husband into a trustee for her of the rents and profits, during the coverture, which otherwise would belong to him. In dealing with those, she would have the capacity of a feme sole, upon the principles which have been stated. But in respect to the corpus of the estate, she could not dispose of it except in the mode prescribed by law, that is, by a fine or recovery, or such other solemnity as the law required for the disposition of estates in land by married women. Roper on Husband and Wife, 182; 2 Story Eq. § 1392; Clancy Rights of Married Women, 287, and cases cited in notes to these authorities. If, however, the deed to her during her coverture not only conveyed the estate to her, to her sole and separate use, but in terms gave her an absolute power of disposal, then acting under the power specially conferred, it seems she could, without the solemnities required by law, convey the whole estate, although no trust was interposed to protect the exercise of the power. Story Eq. supra. But this required the aid of no doctrine of equity peculiar to separate estates, for a married woman may execute a power without imputing to her the character or capacity of a feme sole. Equity, it seems, in such cases, if not the law, preserved the power, although the donee also held the fee of the lands in respect to which it was to be exercised.

These general principles, which scarcely admit of question, are evidently fatal to the present attempt to charge the fee of Mrs. Dederer's lands, and to dispose of that fee for the satisfaction of her alleged debt. The well known disabilities of coverture, as they exist at the common law, prevented her from thus disposing of her real estate. This would be decisive of the case before us, but for the recent legislation of this State "for the more effectual protection of the rights of married women." See the Statutes of 1848 and 1849, above cited. It has not been claimed on the

argument that the case is influenced favorably to the plaintiff by these statutes. They nevertheless seem to require some consideration.

The Act of 1849, amending the law of 1848, provides that "any married female may take, by inheritance, gift, &c., and hold to her sole and separate use, and convey and devise, real and personal property," &c., in the same manner and with the like effect as if she were unmarried. In respect to estates acquired and held under the protection of this statute, the disabilities of coverture would seem to be removed. A married woman may "convey and devise" real and personal property as if she were unmarried. She may, therefore, dispose of lands, in which she holds the legal title, without joining with her husband in the conveyance, and without the solemnity of private examination and acknowledg-I think it is plain, however, that the statute does not remove the incapacity which prevents her from contracting debts. She may convey and devise her real and personal estate, but her promissory note or other personal engagement is void, as it always was by the rules of the common law. This legal incapacity is a far higher protection to married women than the wisest scheme of legislation can be, and we should hardly expect to find it removed in a statute intended for "the more effectual protection of her rights." It is quite another question, however, whether she may not charge her legal estate, held under this statute, in the cases and to the extent recognized by Courts of Equity in respect to estates held under a trust for her separate use. right to charge her separate estate, in equity, resulted from the jus disponendi which Courts of Equity regarded her as having, and it was a necessary incident of the full enjoyment of her property. It would seem for reasons quite similar, that she should have the power to charge an estate acquired and held under the statute referred to. The estate it is true, is a legal one; but the disability of coverture, which as we have seen, prevented her from disposing of or charging such estates in equity, no longer exists. That disability, as we have also seen, was overcome when she acted under a power of disposition conferred by the instrument conveying the estate. But that power is given in the broadest terms by the statute, and I see no reason why a power thus bestowed should not be equal in its results to one conferred by a private instrument. My conclusion, therefore, is that, although

the legal disability to contract remains, as at common law, a married woman may, as incidental to the perfect right of property and power of disposition which she takes under this statute, charge her estate for the purposes and to the extent which the rule in equity has heretofore sanctioned in reference to separate estates.

But without knowing facts which are not stated in the case, such as the time of Mrs. Dederer's marriage and the time when she acquired the lands in question, it is impossible to say with any certainty whether she holds her title under the statute and with the power of disposition which it confers. If we assume that to be her condition (and the facts may so appear hereafter), then we are brought to the question principally discussed on the argument, and that is whether she can and does charge her separate estate, real or personal, by signing a promissory note, in no way for the benefit of such estate, but as surety merely for her husband. This question I have examined with the attention which its importance deserves.

The contract of a married woman being void at law, the difficulty of subjecting her estate in equity to the payment of a note or bond given by her was felt by the courts to be very great. The difficulty was, however, overcome, and the rule must now be regarded as settled, that the written engagements of a married woman, entered into on her own account, to pay money, are to be satisfied out of her separate estate. North American Coal Company v. Dyett, 7 Paige, 9; Heatley v. Thomas, 15 Ves. 596; Bullpin v. Clarke, 17 Ves. 365; Stuart v. Kirkwall, 3 Madd. 387; Owens v. Dickenson, Craig & Phil. 48; 2 Story Eq. § 1400. Where the obligation is not on her own account, and in no sense for the benefit of her estate, the question, whether a charge is thereby created, must depend, I think, on the principle which lies at the foundation of the rule just stated. If the note or bond of a feme covert is to be taken as a particular appointment of her estate to pay it, in the nature of an execution of a power of disposition, then I see no reason for a distinction where she is a surety merely. This was the theory of some of the cases on the subject, but this was obviously a mere fiction. engagement to pay money is not in its nature an engagement to pay out of any particular fund, and cannot, except by a fiction, be regarded as an appointment or disposition of the fund. There

is also this further difficulty, which was suggested by Lord Cottenham, in Owens v. Dickenson, supra, that if a married woman has contracted several debts in writing, and the instruments are to be regarded as appointments of her estate, the creditors would take priority according to the date of the several instruments. The contrary of this is plainly true. The creditors of a feme covert have no priority over each other, unless it be acquired by superior diligence in proceeding to obtain satisfaction, or by some specific lien expressly created for that purpose. Again, as the law now is with us, since the statute of 1849, suppose before or after marriage she takes real or personal estate by inheritance or distribution; in such a case, the fiction of appointment under a power, when she disposes of such an estate, is too absurd to be for a moment entertained.

The earliest cases on this subject proceeded on a more intelligible principle, which did not require the aid of a fiction. in Norton v. Turville, 2 P. Wms. 145, payment of a married woman's bond, given for money borrowed by her, was decreed out of her separate estate, on the ground that it was to be deemed as held in trust for the payment of her debts. was regarded as one of the separate uses for which the trust was created. So, in Peacock v. Monk, 2 Ves. Sen. 193, Lord HARDWICKE said: "If a wife, having an estate to her separate use, borrowed money and gave a bond for its payment, this would give a foundation to demand the money out of her separate estate. So also, in Hulme v. Tenant, 1 Brown C. C. 20, Lord Thurlow held that the trustees of a married woman's estate were obliged in equity to apply it to the satisfaction of her general engagements. These early cases did not suggest the fiction of an appointment, but proceeded on the notion of a trust and the plain equity of requiring a married woman's engagement, entered into for her own benefit, to be satisfied out of the trust estate. Afterwards that fiction was resorted to, which, besides the objection to it as a mere assumption, having not the slightest foundation in fact, worked the actual injustice of rejecting the claims of creditors whose demands were based upon a mere general assumpsit for money had and received, where there was no written engagement to pay. In such cases the fiction of appointment was too grave to be received, and therefore, as there was no appointment, there could be no

charge, and so it was held. Bolton v. Williams, 2 Ves. Jr. 138; Jones v. Harris, 9 id. 486.

But the still later cases have in terms or effect repudiated the fiction of an appointment, and with it the distinction between the written engagement of a feme covert and her general liability for money advanced, services rendered, or goods In Owens v. Dickenson, supra, Lord Cottenham resold. stored the liability of separate estates to the basis on which it had been rested in the early cases above cited. His observations in that case demonstrate with great clearness that a simple note or bond cannot, in its very nature, be an appointment or charge upon the estate. Speaking of such instruments, he said: "It has sometimes been treated as a disposing of the particular estate; but the contract is silent as to the separate estate, for a promissory note is merely a contract to pay, without saying out of what it is to be paid, or by what means it is to be paid, and it is not correct, according to legal principles, to say that a contract to pay is to be construed into a contract to pay out of a particular property, so as to constitute a lien on that property." "Equity," he adds, "lays hold of the separate property, but not by virtue of anything expressed in the contract; and it is not very consistent with correct principles to add to the contract that which the party has not thought proper to introduce into it." Murray v. Barlee, 3 Myl. & K. 209; Bell on the Law of Property, 518, 519; Macqueen on Husband and Wife, 801, 803. The principle, in short, which now governs in cases of this kind, is that a wife's separate estate is liable to pay her debts during coverture, in whatever form they are incurred, not because her contracts have any validity at law, nor by way of appointment or charge, but because equity decrees it to be just that they should be paid out of such estate. Of course, it is not to be denied that a wife may appoint or specifically appropriate her separate estate to the payment of her own or her husband's debts. She may, if she pleases, even give it to her husband. What I am denying is, that contracting the debt is, of itself, an appointment or charge.

Can, then, the principle on which the liability depends be extended to cases of mere suretyship for the husband or a stranger? It seems to me it cannot. The obligation of a surety, in all other cases, is held to be *stricti juris*, and if his contract is void at law, there is no liability in equity founded on the consideration be-

tween the principal parties. Thus, in Ludlow v. Simond, 2 Cai. Cases in Error, 1, the bill was filed to sustain a contract against a surety who had been technically discharged at law. The subject was very fully examined in the Court of Errors by Chief Justice Kent and by Justices Spencer and Thompson, and the suit was determined against the plaintiff, on the ground that there was no equitable liability upon a surety where he could not be held at law. Why should a married woman be made an exception to this rule? We are to remember that her contract is absolutely void at law; and when she is a mere surety there is no equity springing out of the consideration. If the promise is on her own account, if she or her separate estate receive a benefit, equity will lay hold of those circumstances and compel her property to respond to the engagement. Where these grounds of liability do not exist, there is no principle on which her estate can be made answerable. If we hold that the signing of a note as surety brings a charge upon her estate, we must go further, and hold also that her guaranty, her indorsement, her accommodation acceptance, her bail bond, indeed every conceivable instrument which she may be persuaded to sign for her husband or others, although absolutely void at law, are so far binding in equity as to charge her property with its payment. This would be a doctrine sustained by no analogies and opposed to the soundest policy. It would go far to withdraw those checks which are intended to preserve a wife from marital influences, which may be and often are unduly exerted, and yet baffle all detection. The doctrine that equity regards her as a feme sole, in respect to her separate estate, only admits that she may dispose of such estate with or without consent of her husband, and without the solemnities which the law in other cases requires. But her mere promise to pay money, as we have seen, is not of itself such a disposition. Courts of Equity, proceeding in rem., will take hold of her estate and appropriate it to the payment of her debts. But when her obligation is one of suretyship merely, she owes no debt at law or in equity. If not at law, which is very clear, then quite as clearly not in equity.

It is true, there are one or two English cases in which the trustees of a wife's separate estate were decreed to apply the personal property or the rents and profits of lands to the payment of her obligation as surety. Standford v. Marshall, 2 Atk. 69; Heatley

v. Thomas, 15 Ves. 596. But those cases were decided at a period when the doubt was whether a mere obligation of any kind to pay money could bring a charge upon her estate, without any reference to the distinction between debts contracted for the benefit of herself or of the estate, and engagements entered into as a surety. That distinction was not considered. On the authority of those cases, dicta to the same effect may be found in one or two elementary treatises. 2 Story Eq. § 1400. We have also been referred to the case in this court of Vanderheyden v. Mallory, 1 Comst. 452. But the point determined was, that the debts of a wife contracted before marriage were not a charge upon the separate estate held by her during the coverture. The remark of Ch. J. JEWETT upon the question now involved, was obiter merely, and it appears to have been founded entirely on the observation cited from Judge Story. The case did not call for an examination of any such question. No decision in this State has ever gone beyond the doctrine which I have stated. Curtiss v. Engel, 2 Sand. Ch. R. 287; North American Coal Company v. Dyett, 7 Paige, 9; s. c., 20 Wend. 570. In Curtiss v. Engel, it was held by Vice-Chancellor Sandford that, in order to create a charge, it must be shown either that the debt was contracted for the benefit of the wife's separate estate or for her benefit upon the credit of such estate.

I am satisfied, on the whole, that the decision now under review is, upon the facts before us, opposed to principle and sound policy, and that it rests upon the basis of no established doctrine. The judgment should be reversed and a new trial granted.

HARRIS, J. The effect of marriage at the common law, is to vest the property of the wife in the husband — personal estate absolutely, and real estate during the continuance of the marriage. But in equity, and now by statute, the wife is capable of holding both real and personal property to her own separate and exclusive use. Incidental to this capacity, is the power of disposition; so that now, except in cases where she is restricted by the terms of the instrument under which she acquires title, the wife has the same dominion and power of disposition in respect to her separate property as if she were unmarried.

But while, in respect to her separate property, the disability of coverture no longer exists, it still remains in respect to all her

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executory contracts. No personal remedy can be had against her in equity, any more than at law, upon any such contract. Her contracts are only valid, so far as they operate upon her separate estate. "Although she is still incapable of charging herself at law," says Cowen, J., in Gardner v. Gardner, 22 Wend. 526, "and equally incapable in equity of charging herself personally with debts, yet the better opinion is, that separate debts, contracted by her expressly on her own account, shall in all cases be considered an appointment or appropriation for the benefit of the creditor, as to so much of her separate estate as is sufficient to pay the debt, if she be not disabled to charge it by the terms of the donation."

In equity, there is no difference between the separate estate of a wife, created by operation of the statutes of 1848 and 1849, relating to married women, and a similar estate created by deed or any other instrument. If it be conceded that the effect of these statutes is to vest in her a legal title, whereas before, when her interest was acquired by means of a settlement or deed, she had only an equitable estate, still, so long as her contracts are affected by the disability of coverture, the debts of the wife can only be enforced against her separate estate, however acquired, by a specific charge of such debts upon the separate estate. This can only be done in a Court of Equity. The principle upon which this jurisdiction is exercised is well stated by Lord Cottenham, in Owens v. Dickenson, Craig & Phil. 48. It was there held that the engagements of a married woman ought to be enforced against her separate estate, not as the execution of a power, but as the exercise of a right of property to which is necessarily incident the power of contracting debts to be paid out of it. "Inasmuch," it is said, "as her creditors have not the means at law of compelling payment of those debts, a Court of Equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of her property, as the only means by which they can be satisfied." Though it is often said, that in equity the wife is regarded as a feme sole in regard to her separate property, yet it has never been supposed that even in equity she incurs a personal obligation by her engagements. There can be no proceeding against her in personam. She is regarded as a feme sole, only so far as to enable her to bind by her contract her own separate property. Upon this subject, I concur in the views expressed by

the judges of the Supreme Court, who delivered the prevailing opinions in Colvin v. Currier, 22 Barb. 371.

It remains to inquire whether, in this case, the wife has made such a contract, as by a proceeding in rem in a Court of Equity, should be enforced against her separate property. At the first, it was supposed that the wife could only bind her separate estate by some act creating a direct charge upon it. But in Hulme r. Tenant, 1 Brown C. C. 20, decided in 1778, the question was presented how far the general engagement of the wife should be executed out of her separate property. In that case, the suit was upon a bond executed by the husband and wife, for borrowed money. The principal part of the money had been borrowed by the wife herself. Lord Thurlow declared the rule to be, that the general engagement of the wife shall operate upon her personal property, and the rents and profits of her real estate; and that her trustees should be required to apply the personal estate, and the rents and profits as they might arise, to the satisfaction of such engagement. The doctrine of that case has been much discussed in the English Courts of Equity, but is now deemed to be settled by the decision of Lord Brougham, in Murray v. Barlee, 3 Myl. & K. 209. that case, a married woman, living apart from her husband, and having a separate estate, had employed a solicitor in various transactions and had promised by letter to pay him; it was held, that the separate property of the wife was chargeable with the payment of the solicitor's bill. It is worthy of remark, in reference to this case, that the services for which the plaintiff claimed to be paid out of the separate estate of the wife were rendered for a married woman who lived apart from her husband, and not only upon the credit, but doubtless for the benefit of such estate. The single question before the Court was, whether the pecuniary contract of a married woman, in which there was no reference to her separate estate, should be satisfied out of such estate. It was regarded as a question of intent, and the Court held, that inasmuch as the wife, when she made the engagement, could not be supposed to have intended to do an idle thing, she must be presumed to have intended to satisfy her engagement out of her separate property. The charge was established, because the circumstances of the case were such as to justify the inference that such was the intention of the wife.

Thus it appears that there are two modes in which the separate

estate of a married woman may be charged with the payment of her pecuniary engagement. The one, where she has, in terms and by an appropriate instrument, made such charge; and the other, where, though she has not, in making the contract, referred to her separate estate, or expressed her intention to satisfy it out of such estate, yet the circumstances of the case are such as to leave no reasonable doubt that such was her intention. What shall be deemed sufficient evidence to demonstrate such intention, has been regarded as a question of some difficulty. "The fact," says Story, "that the debt has been contracted during the coverture, either as a principal or as a surety, for herself or for her husband, or jointly with him, seems ordinarily to be held prima facie evidence to charge her separate estate, without any proof of a positive agreement or intention so to do. 2 Story's Eq. Jur. § 1400. The extraordinary caution — perhaps I may say hesitation — with which this proposition is stated by the learned author, deserves to be noticed in this discussion. The writer himself adds that the proposition furnishes "a strong case of constructive implication, founded more upon a desire to do justice than upon any satisfactory reasoning."

It should be conceded, I think, that in England the decisions have gone the length of holding that where the wife, living with her husband, gives her own note or other obligation to pay her own debts, or unites with her husband in giving such a note or obligation to pay his debt, it shall, without any other evidence of her intention, be charged upon her separate estate. But in this State the rule has never been carried so far. The primary object in creating a separate estate and allowing the wife to hold and dispose of her separate property, independently of her husband, has been kept in view. "The wife," says the Chancellor, in Gardner v. Gardner, 7 Paige, 112, "may have a separate estate of her own, which estate is chargeable in equity for any debt she may contract on the credit of, or for the use of, such estate." In the same case, upon appeal, Cowen, J., says: "The better opinion is, that separate debts, contracted by the wife expressly on her own account, shall in all cases be considered an appointment or appropriation for the benefit of the creditor as to so much of her separate estate as is sufficient to pay the debt." Gardner v. Gardner, 22 Wend. The same rule is stated with still greater distinctness by **528.** the late Vice-Chancellor Sandford, in Curtis v. Engel, 2 Sand.

Ch. R. 287: "To sustain their suit," he says, "the plaintiffs must show that the debt was contracted either for the benefit of the separate estate of the wife, or for her own benefit, upon the credit of the separate estate." He adds that "whatever may have been the expressions of judges on the subject, this is the utmost extent to which the doctrine has been carried by the decisions in this State." Dickerman v. Abrahams, 21 Barb. 551; Colvin v. Currier, above cited; Goodall v. McAdam and wife, 14 How. Pr. R. 385. In the latter case the wife had united with her husband in signing a bond for the payment of money. The action was brought for the purpose of charging the payment of the bond upon the separate estate of the wife. After a pretty full examination of the authorities on the subject, the conclusion of Mr. Justice HOFFMAN is, that where a note or bond is signed by the husband and wife, in the absence of any evidence to show that it was given for the benefit of the wife, the legal inference is that it was for the debt of the husband, and the separate estate of the wife will not be So, also, in The North American Coal Company v. Dyett, 7 Paige, 9, the Chancellor says: "The feme covert is, as to her separate estate, considered as a feme sole, and may, in person or by her legally authorized agent, bind such separate estate with the payment of debts contracted for the benefit of that estate, or for her own benefit upon its credit." Same case upon appeal, 20 Wend. 570.

The rule thus uniformly asserted by the Courts of this State is, in my judgment, more equitable and more in harmony with the policy of the law which allows a married woman to hold and dispose of her property independently of her husband than the rule which has been adopted by the Supreme Court in this case. simply a rule of evidence. All agree that when the wife has expressly charged the payment of a debt upon her separate estate, whether it be her own debt or the debt of another, such charge is valid and will be enforced. But to hold that the mere fact of her engaging to pay money, without regard to the question whether such engagement was for her own benefit or that of her estate, is sufficient evidence of an intention to charge such payment upon her separate estate, would, in many instances, defeat the very object of allowing her to hold a separate estate. Indeed, there is much to recommend the practice, which has been adopted in some of the States, of looking into the circumstances of the

case sufficiently to see that the wife will suffer no injustice before allowing a charge upon her separate estate to be enforced. Maywood v. Johnson, 1 Hill's Ch. R. 228. In this case it was held that the court would inquire into the propriety of an express charge, and not allow the wife to charge her estate by her own mere act and will, without evidence that it was necessary, or at least proper; and in Reid v. Lamar, 1 Strofbart's Eq. 27, it was held that where property was settled upon a wife to be at her "full and free disposal," it was not to be charged with a note given by her with her husband.

The object of settlements, and the other arrangements which were resorted to for the purpose of securing to the wife a separate estate, was "to protect her weakness against the husband's power, and provide a maintenance against his dissipation." So, too, the legislature, when it declared that the property of the wife "shall not be subject to the disposal of her husband, nor be liable for his debts, and continue her sole and separate property as if she were a single female," intended, so far as it could be done by legislation, to protect her against the improvidence and misfortunes of her husband. At the common law, the power of the husband over her estate as well as her person was almost unlimited. By this statute, and before by settlements and other contrivances which were sanctioned by a Court of Equity, the wife is enabled to enjoy her own property independently of her husband.

This right of enjoyment includes the right of disposition. Having this power, she, of course, has the power to charge the estate with the payment of her debts. When she does this of her own free will, uninfluenced by any unfair practices, however injudicious or improvident the act, the charge must be enforced. But when her intention to create such a charge has not been expressed, and there is no direct evidence of such intention, the mere fact that the creditor is able to present a note or other obligation bearing her signature as well as that of her husband, ought not—in view of the policy of the law under which she holds her property, and her position as a wife, liable to be controlled by influences which it may be impossible to detect—to be regarded as sufficient evidence to justify the inference that it was her voluntary intention to charge the payment of the debt upon her own separate property. I think that in such a case, the

equitable rule is that which has been invariably adopted in this State, which is, that where the intention to create the charge has not been expressed, and can only be implied from the fact that she has become indebted, either individually or jointly with her husband, it must appear that the debt was contracted for the benefit of her separate estate, or for her own benefit upon the credit of her estate, before the estate can be charged with its payment.

In the case before us there is an entire absence of any such proof. Indeed, the contrary is proved. Instead of being the debt of the wife, it is proved to be the debt of the husband. There is no evidence that the wife consented to have the payment of the note charged upon her separate estate, except such as is derivable from the fact that her signature is found upon the note. Under what circumstances, or upon what representations, or by what influences, she was induced to sign the note does not appear. I am of opinion that such a state of facts is not sufficient evidence of an intention, on the part of the wife, that the payment note should be charged upon her separate estate.

The judgment of the Supreme Court, therefore, should be reversed and a new trial granted, with costs to abide the event.

STRONG, J., expressed no opinion; Denio and Roosevelt, Js., dissented.

Judgment reversed and new trial ordered.

V

YALE v. ELIZA ANN DEDERER.

(22 N. Y. 450. Court of Appeals of New York, 1860.)

Selden, J. The judge before whom this cause was last tried has found that the defendant, in giving the note upon which the action was founded, intended to charge her separate estate with its payment. In this respect only does the case, as now presented, differ from the same case when previously here (18 N. Y. 265). For, although the judge has also found, in his specification of facts, that she did charge her estate, yet this is a mere statement of the legal effect of the defendant's acts, and would

have found a more appropriate place among the conclusions of law, drawn by the judge from the facts proved.

It does not expressly appear from the statement of facts, whether the title of the defendant to her separate estate was acquired before or after the Acts of 1848 and 1849, nor consequently whether that title was legal or equitable. It is, perhaps, to be inferred from the form of expression used by the judge in describing the defendant's estate, viz., "a separate estate consisting of three farms," that it was a legal estate acquired subsequently to the passing of these acts. This, however, is immaterial, it having been settled, when this case was formerly here, that the statutes of 1848 and 1849 did not remove the general disability of married women to bind themselves by their contracts; but that the power conferred by those statutes, to hold to their separate use, and to convey and devise all their real and personal estate as if unmarried, carried with it the power to charge such estate substantially in the manner and to the extent previously authorized by the rules of equity in respect to separate estates.

To dispose of this case, therefore, we have only to ascertain whether a married woman having, prior to the statutes of 1848 and 1849, a separate equitable estate, could create a charge upon that estate, by giving a promissory note for the debt of her husband, intending thereby to charge her estate, but without indicating this intention in any manner by the contents of the note. It was settled, when the case was here before, that the bare giving of such a note did not bind the estate. It becomes necessary now to inquire whether the additional fact, that the wife, at the time of making the note, intended to charge her separate estate, changes the rule.

Much has been said, in the course of the decisions on this subject, in regard to the intention of the wife at the time of making the contract; and in order properly to appreciate the force of these remarks, a brief retrospect of the law of separate estates is required. I shall not attempt a review of the cases, confused and contradictory as some of them are, but desire to call attention to one or two features of the controversy carried on in the English Courts for nearly a century, and which can hardly even now be considered as ended, in regard to the effect of the contracts of married women upon their separate estates. If the instrument by which the estate was created, conferred upon the wife either a

general or qualified power of disposition, no one ever questioned her rights to execute this power; the doubts which arose related to her right to dispose of or charge the property, independently of any such special authority; and this right was established soon after the introduction of such estates, upon the ground that the right of disposal was a necessary incident of the right of property.

That this universal jus disponendi was the sole and only foundation of the right in question is clear. Lord Thurlow, in the case of Fettiplace v. Gorges, 8 Bro. C. C. 8, places the right upon this ground, and no other basis has ever been suggested for it. Assuming this then to be the foundation of the right, it is plain that the wife, to avail herself of it, must make some disposition of the specific property itself. It is clearly impossible to deduce, from the jus disponendi, which accompanies all rights of property, power to make any contracts, except such as related directly to the property to which the right of disposition is attached; and yet the Master of the Rolls, in Norton v. Turvill, 2 Pr. W. 144, and in Standford v. Marshall, 2 Atk. 69, held the separate estate of a married woman liable for the payment of her bond, although the bond in no manner referred to such separate estate; and in the latter case was given for money lent to the husband.

The reasoning upon which these cases are said to have proceeded, and upon which they were followed by Lord Thurlow, was this: That it being the rule in equity, that a wife who had a separate estate might deal with such estate in the same manner as if she were sole, it followed that such estate was liable for her engagements, in the same manner as it would be if she were a The equitable rule, which being founded entirely in the right of the wife to dispose of her property, could go no further than to allow her to make contracts specifically appropriating or charging her separate estate, was thus expanded, so as to enable her to contract generally without in any manner referring to such estate. The doctrine was justly characterized by Chancellor Kent in the case of The Methodist Episcopal Church v. Jaques, 3 John. Ch. 77, where, speaking of the two cases to which I have referred, among others he says: "It is difficult to perceive upon what reasoning or doctrine the bond or parol promises of a feme covert could for a moment be deemed valid. She is incapable of contracting, according to the 'common right'

mentioned by Lord Macclesfield; and if investing her with separate property, gives her the capacity of a feme sole, it is only when she is directly dealing with that very property. The cases do not pretend to give her any of the rights of a feme sole in any other view, or for any other purpose."

But, although Lord THURLOW followed, as we have said, what he supposed to be the rule established by the cases referred to, he nevertheless saw the fallacy upon which those cases were based, as appears by his remarks in the case of Hulme v. Tenant, 1 Bro. C. C. 16, the leading case on this subject. There the separate estate of a wife was held liable for the payment of her bond given for money borrowed, part of which had been borrowed by her husband, and the residue by herself. After referring to the previous cases, Lord Thurlow says: "I take it, therefore, it is impossible to say, but that a feme covert is competent to act as a feme sole with respect to her separate property, when settled to her separate use; but the question here goes a little beyond that; it is not only how far she may act upon her separate property, ---I have no doubt about that; but the question is, how far her general personal engagements shall be executed out of her separate property." Still, although thus clearly seeing the distinction which ought, as it would seem, to have been decisive against the claim, he nevertheless yields to the authority of the previous cases, and holds the separate estate liable.

The debt in the last case, as well as in the previous cases of Norton v. Turvill, and Standford v. Marshall, was by bond. But it is obvious, that if the principle upon which they were based was sound, it embraced every debt of the wife, however created, whether by bond, note, or by a mere oral promise; and so the doctrine was subsequently applied by Lord Thurlow himself in the case of Lilia v. Airey, 1 Ves. 277. It is true, that in this case the separate estate consisted of a specific sum allowed by the husband to the wife by way of separate maintenance, and resort has been sometimes had to that fact as explaining the decision. But no reliance is placed upon this circumstance by Lord Thurlow, nor could it properly affect the result. The decision was the legitimate consequence of the theory of the wife's liability adopted in the previous cases.

But the unsoundness of this theory was soon discovered, and it was rejected two years afterwards, in the case of Bolton v.

Williams, 2 Ves. 138, by Lord Chancellor Loughborough, who denied the liability of a married woman's separate estate for her general parol engagements, and explained the previous cases upon the ground that the securities which the wife had executed operated as appointments of her separate property, that is, as appropriations or pledges of such property for the payment of the debt for which the security was given.

This new theory that a written security was an appointment was as plainly erroneous as that for which it was substituted. It was evidently a pure fiction. The doctrine proceeded upon the assumption that a wife's separate estate is not liable for her general engagements, but only for such as are specifically charged upon it, and yet held it liable for a bond or note, which in no manner referred to such estate. If these written securities operated as appointments, then it must necessarily follow that every such security would create an equitable charge or lien upon the estate from the time of its execution; still, they were uniformly treated, not as specific liens, but as mere general debts, having no priority over other and later claims. It was expressly held by Sir John Leach, Master of the Rolls, in an anonymous case, 18 Ves. 258, where the questions arose, that in such cases there was no priority, and that all the debts must be paid equally.

But notwithstanding these inconsistencies, this doctrine that a written security was an appointment and a charge, while it was otherwise with a mere parol promise, was maintained substantially unchanged, from the time of its introduction by Lord LOUGHBOROUGH, in Bolton v. Williams, until the case of Murray v. Barlee, 4 Sim. 82, when Lord Brougham rejected the distinction between a written security and a promise by parol, and extended the rule so as to make the mere parol engagements of a wife a charge, as well as her bond or note. Speaking on that subject, he says: "I own I can conceive no reason for drawing any such distinction. If, in respect of her separate estate, the wife is in equity taken as a feme sole, and can charge it by instruments absolutely void at law, can there be any reason for holding that her liability, or more properly, her power of affecting the separate estate, shall only be exercised by a written instrument? Are we entitled to invent a rule, to add a new chapter to the statute of frauds, and to require writing where the act requires none? Is there any equity reaching written dealings with the

property which extends not also to dealing in other ways, as by sale and delivery of goods? Shall necessary supplies for her maintenance not touch the estate, and yet money furnished to squander away at play be a charge on it, if fortified by a scrap of writing? No such distinction can be taken upon any conceivable principle."

It is impossible to deny the force and conclusiveness of this The distinction which it combats was clearly untenable. But the learned Chancellor was, I think, less successful in another part of the same opinion, in which he attempts to explain the ground upon which it had been previously held, that the bond or note of a married woman, and upon which he held that all her engagements, whether in writing or by parol, were charged upon her separate estate. He says, that although originally the Courts supposed that, to affect the separate estate, there must be some real charge, as a mortgage, or an instrument amounting to the execution of a power, afterwards the intention of the wife "was more regarded, and the Court only required to be satisfied that she intended to deal with her separate property." The reasoning by which her intention was supposed to be established was, that when a married woman gives her bond or note; or contracts a debt in any other manner, it must be presumed that she intended it to have some effect; and inasmuch as it is void at law, and can have no effect unless it is a charge upon her separate estate, it follows that she must intend it to be such a charge.

The intention here spoken of is not an intention which is proved by extraneous evidence dehors the contract, but an intention which is to be inferred from, and is therefore embraced in or manifested by, the contract itself. No court has ever held or intimated that parol evidence was admissible to prove that the bond or note of a feme covert was intended to be a charge upon her estate. To permit this would be in direct conflict with the rule which excludes all parol evidence offered to explain a written instrument. The intent, to be of any importance, must be a part of the contract; that is, the true meaning of the contract when justly interpreted must be, that the debt which it creates should be a charge upon the estate. This case, therefore, is not materially strengthened on the part of the plaintiff by the finding of the judge that the defendant intended the debt to be a charge, as that

intention, if it existed, forms no part of the note, which must be regarded as the only evidence of the contract.

But the reasoning of Lord Brougham in Murray v. Barlee has been since overthrown, and the doctrine based upon it is not now the doctrine of the English Courts. In the case of Owens v. Dickenson, 1 Craig & Ph. 48, Lord Chancellor Cottenham appears to have seen that there could be no real foundation for the assumption that because a married woman had executed a bond or note, or contracted a debt in any other form, therefore she must have intended to charge such debt upon her separate estate. He first shows, what indeed is very plain, that if the doctrine is sound, then every debt must become a specific lien upon the separate estate, to be paid in the order of its priority; while Lord Brougham held that such debts are all to be paid pari passu. He then argues very conclusively to prove that a contract which is entirely silent as to the separate estate, and makes no reference whatever to its existence, cannot by any legal reasoning be shown to have been intended as a disposition of such estate.

After thus removing the only ground upon which every English Chancellor, from Lord Loughborough to Lord Brougham, had held a bond or note, and upon which the latter had held every other contract to create a charge, Lord Cottenham proceeds to inaugurate an entirely new doctrine on the subject, which is, that equity lays hold of the separate property and appropriates it to the payment of the debt; not on account of anything contained in the contract; not because the wife by any agreement, either express or implied, has made the debt a charge, but for reasons which I will give in the learned Chancellor's own words: "The separate property of a married woman being a creature of equity, it follows, that if she has a power to deal with it, she has the other powers incident to property in general, namely: the power of contracting debts to be paid out of it; and inasmuch as her creditors have not the means at law of compelling payment of those debts, a Court of Equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property, as the only means by which they can be satisfied."

This is by no means a return to the primary doctrine of the English Courts on this subject. Lord Thurlow never suggested that equity had any power to take the separate property of a married

woman and appropriate it to the payment of debts which she had never in any manner charged upon it. It is an attempt to support, by an entirely new process of reasoning, a course of decision which Lord Cottenham plainly saw could not be sustained upon any of the grounds upon which it had been previously placed.

But whether we adopt this last phase which the shifting doctrine in respect to a wife's separate estate has assumed or not, it is certain that the judgment in the present case cannot be upheld. As was shown by Judge Comstock when this case was here before, mere equity, not resting upon any positive contract, will never seize upon the separate estate of the wife, and appropriate it to the payment of a debt of the husband, for which she is a mere surety; and it follows from what has been previously said, that the estate of the defendant cannot be held liable upon this note, upon the ground that she intended to make it a charge; because to make such an intent of any importance, it must be either expressed or implied in the terms of the contract.

But I am unwilling to leave it to be inferred that I assent to the doctrine of Lord Cottenham. It seems to me even less defensible than the theories which preceded it. Those theories conceded that the separate estate of a feme covert could not be appropriated in payment of her debt, unless she voluntarily charged such debt upon her estate. Their error consisted in raising an implication of an actual appointment or charge upon wholly insufficient grounds. But Lord Cottenham's doctrine denies the necessity of any intentional charge of the debt at all by the wife upon her separate estate, although it at the same time makes her power to dispose of that estate the basis of its liability. His argument, when reduced to its simplest terms is, that a married woman who has a separate estate has power in equity to charge any debt she may incur upon such estate; and inasmuch as the general creditors of such married woman, whose debts have not been thus charged, have no other means of collecting them, equity takes hold of the separate estate, and appropriates it to their payment.

Can this be sound? I am unable to see any logical connection between the premises and the conclusion. It may be very just, abstractly considered, that equity should thus dispose of the estate; but it is clearly impossible to deduce the doctrine

from the just disponendi of the wife, which is its only foundation. The truth would seem to be that this mode of dealing with the estates of married women, to the extent to which it has been carried by the English Courts, could not be sustained by any process of legal reasoning, and hence the grounds upon which it was made to rest have been repeatedly changed, and the rule itself has been fluctuating and uncertain.

These views are not new. Judge Story, in his work on Equity Jurisprudence, says: "It has been remarked, that this rule of holding that a general security, executed by a married woman, purporting only to create a personal demand, and not referring to her separate property, shall be intended as prima facie an appointment or charge upon her separate property, is a strong case of constructive implication by Courts of Equity, founded more upon a desire to do justice, than upon any satisfactory reasoning."

The Courts of this State have never, as yet, adopted the dootrines of the English Court of Chancery on this subject; certainly not to their full extent: and it would in my view be inexpedient now to do so, for various reasons. If we attempt to follow a class of decisions which obviously rest upon no solid basis of principles, we can never arrive at any settled conclusion. The views of Lord Cottenham are no more likely to be permanent than those of his numerous predecessors. Some future Lord Chancellor may detect the fallacy of his reasoning as he detected that of Lord Brougham. No rule can ever be stable, the reasons given for which are constantly changing. If we desire precision and certainty in this branch of the laws, we must recur to the foundation of the power of a feme covert to charge her separate estate; and this has heretofore arisen solely from her incidental power to dispose of that estate. Starting from this point, it is plain that no debt can be a charge which is not connected by agreement, either express or implied, with the estate. If contracted for the direct benefit of the estate itself, it would, of course, become a lien; upon a well founded presumption that the parties so intended and in analogy to the doctrine of equitable mortgages for purchase money. But no other kind of debt can, as it seems to me, be thus charged without some affirmative act of the wife evincing that intention; and there is no reason why her acts in this respect should not be

tested by the same principles and rules of evidence which are applied to similar questions in other cases.

But there is a strong additional reason why this court should decline at this time to adopt the fictitious theories on this subject which have so long prevailed in the English Courts. ried women are not hereafter to be indebted to equity merely for protection in the enjoyment of their separate estates. hold them by a legal title and have a legal right to dispose of them. The Acts of 1849 and 1860 are henceforth, if not repealed, to be the source of their power over such estates. There is no longer any foundation for the argument, that as equity creates and protects these estates, equity has a right to control them. Rules, therefore, which have grown up under this idea, which I regard as to some extent illusory, will be hereafter entirely inappropriate. I shall not attempt at this time to put a construction upon those acts. That of 1860 authorizes married women to carry on any trade or business upon their own account; but with this exception, the only contracts which it empowers them to make, are those which have direct reference to their separate property: and even this power, where the property consists of real estate, is subjected to a very important restriction; the consent in writing of the husband, or the authority of a Court, being rendered essential to its exercise.

These provisions show that the legislature has not even now intended to remove the common-law disability of married women to bind themselves by their contracts at large. To be obligatory upon them or their estates under our latest statute, their contracts must relate entirely to their separate property, or to the particular trade or business in which they are engaged. legislation harmonizes with the views I have advanced in regard to the effect of the contracts of married women. It lends no countenance to the idea that the mere possession of separate estates renders their contracts having no relation to such estates binding upon them. It would be impossible, as it seems to me, to hold, under our statutes, that the mere execution of a security by a married woman not connected by agreement with her estate could be a charge upon it; and yet the power of disposal conferred by these statutes, is, to say the least, as complete as that previously possessed by married women by virtue of the jus disponendi, which resulted from mere ownership. There would,

therefore, be a manifest incongruity in holding, in the present case, that prior to our late statutes the debt of a feme covert not connected with her separate estate, nor in any manner charged by contract upon it, could be enforced against it, and then deciding, as we evidently must, that under those statutes an actual charge is necessary.

The judgment of the Supreme Court should be reversed, and there should be a new trial, with costs to abide the event.

All the judges concurred; Comstock, Ch. J., Denio and Bacon, Js., upon the ground that the case as now presented did not vary from that when here before. A majority concurred in the opinion that the intention to charge the separate estate must be stated in the contract itself, or the consideration must be one going to the direct benefit of the estate.

Judgment reversed, and new trial ordered.

YALE v. ELIZA ANN DEDERER.

(68 N. Y. 329. Court of Appeals of New York, 1877.)

Church, Ch. J. This is the third time this case has been before the Court. The first time it was decided that in order for a married woman to charge her separate estate with a debt not contracted for the benefit of her estate, it was necessary that there should be evidence of an intention thus to charge it, and that a note or other obligation was not sufficient evi-18 N. Y. 265. On the next trial it was found that the defendant did intend to charge her separate estate, and this Court held that when the obligation was in writing, such intention must be expressed in the instrument creating the obligation. 22 N. Y. 450. Upon the last trial it was sought to take the case out of the rule by evidence tending to show that the property was purchased by the husband as the agent of the defendant, and for her benefit and the benefit of her separate estate.

The consideration of the note in suit was the purchase by the husband, in 1852, of twenty-one cows at twenty-six dollars

and fifty cents a head, and in 1853 of twelve cows at twentynine dollars a head. For the first purchase the husband gave his individual note, payable in the fall, when a new joint and several note was given by him and the defendant, and for the last purchase the husband gave his individual note, and several months thereafter he and the defendant gave their joint and several note for the amount of the last note and of the note for the first purchase. It is found by the judge that the defendant signed the note as the surety of her husband, and that none of the consideration for which said notes were given went to enhance the separate estate of the defendant, nor did any part thereof go to her own benefit, and he refused to find that the husband purchased the property as agent of the defendant. There is evidence sufficient to support each of these findings, the rule being that if there is any evidence justifying a finding, this Court will not disturb it, and the rule is also well settled that this Court will not consider the evidence for the purpose of reversing a judgment entered on a trial by a single judge or referee, and that the Court will imply findings warranted by the evidence to sustain the judgment.

It is claimed, however, that there are other findings, which so impair the force of those referred to as to justify a reversal of the judgment. These are that the defendant owned three and the husband two farms; that all the farms were managed by the husband; that the cows were purchased to be used on said several farms, including the farms of defendant; that the cows were sold upon the agreement that the defendant was to give her note, and upon representations of the defendant's ability; that they were used indiscriminately upon all the farms, including those of the defendant; that those first purchased were kept upon one of defendant's farms until spring; that they were purchased on the credit of defendant and of her estate; and that she intended to charge her separate estate for the amount.

From the findings and the evidence it must be assumed that the husband managed the farms, including those of his wife, for his own benefit; and both findings and evidence establish that the property became by the purchase his property. The circumstance that the cows were at times used upon the farms of the defendant, and changed about between these and the farms of the husband,

is entirely consistent, not only with, but tends to corroborate, the position that the husband managed the farms on his own and not on his wife's account, and the fact that the property was purchased on his wife's credit and that of her estate, is consistent with her being a surety. The plaintiff sold the property, doubtless, upon the credit of the defendant, and of her estate; but this might be equally true, whether she was principal or surety, and the same might be said in respect to any other person proposed as surety.

Neither of the facts found upon request are inconsistent with the express finding that she signed as surety for her husband, and that the purchase was not for the benefit of her separate The fact that she intended to charge her separate estate was not evidenced by being expressed in the writing. the precise point decided when the case was last before the Court. 22 N. Y. supra. The point that the refusal to find, as requested, that if the consideration was in any degree for the benefit of the separate estate of the defendant, the debt is a charge upon her estate was error, is answered by the express, affirmative finding that "none of the consideration" of said notes "went to enhance the separate estate" of the defendant, "nor did any part thereof go to her own benefit," without considering whether the abstract proposition, as stated in the request, as a question of law, is correct or not. It is impossible to distinguish the case in its legal aspects from what it was when last before this Court, and the decision then made must stand as the law of the case. It is res adjudicata between these parties. In the case of The Manhattan B. and M. Company v. Thompson, 58 N. Y. 80, in delivering the opinion of the Court, I intimated a regret that the rule had not been established differently, so that, since married women are allowed by statute to take, hold, manage, and dispose of property as fully and completely as if they were unmarried, the signing of a note or other obligation should be deemed sufficient evidence of an intention to charge their separate estates, and further reflection and examination have confirmed the impression then expressed, but I then thought that the rule had been too long established as the law of the State to justify this Court in overruling it, and I am still of that opinion. It is better to adhere to a rule of doubtful propriety, which has been deliberately settled for a long series of years and repeatedly reiterated by all the Courts of the State, than, by overturning it, to weaken the

anthority of judicial decisions, and render the law fluctuating and uncertain.

The two decisions referred to were made by this Court when it was composed of judges of eminent ability and learning, and there are now differences of opinion among judges and lawyers upon the subject, and there is every reason for referring the question to the legislative power, to determine definitely what rule shall finally prevail.

It is proper to add that the learned counsel for the appellant is mistaken in supposing that the dissenting judges in 58 New York supra intended by their votes to overrule the decision of Yale v. Dederer, 22 N. Y. supra. They voted to sustain the action in that case within that decision.

All the members of the Court concurred in the impropriety of overruling the decision.

The judgment must be affirmed. All concur.

Judgment affirmed.

BANK v. PRUYN.

(90 N. Y. 250. Court of Appeals of New York, 1882.)

Contract of Wife by Promissory Note payable to the Order of her Husband and discounted by him. — When her Separate Estate is bound.

TRACY, J. A married woman cannot bind herself by contract, unless, first, the obligation was created by her in or about carrying on her trade or business; or, second, the contract relates to or is made for the benefit of her separate estate; or, third, intention to charge the separate estate is expressed in the instrument or contract by which the liability is created. The Manhattan Brass and Mfg. Co. v. Thompson, 58 N. Y. 80; Nash v. Mitchell, 71 id. 199; 27 Am. Rep. 88; or, fourth, the debt was created for property purchased by her. Tiemeyer v. Turnquist, 85 N. Y. 516; 39 Am. Rep. 674.

No intention to charge the separate estate of the defendant was expressed in the notes in question, and the Court before whom the cause was tried has found as a fact that the defendant was not engaged in carrying on any separate trade or business at the time of the giving of the notes. The only possible ground of liability remaining, therefore, is that the contract was in fact made for the benefit of her separate estate, or that she represented to plaintiff that it was so made, and that in discounting the notes it acted upon the faith of such representation. But the trial Court has also found that the notes were not in fact made for the benefit of her separate estate, and that no part of the avails thereof were used in, or upon, or went to the benefit thereof; and there would seem to be abundant evidence to support such finding. We have only then to consider whether the defendant, at the time the money was obtained upon the notes, represented to the plaintiff that they were for the benefit of her separate estate, and the plaintiff discounted the notes upon the faith of such representations.

It is not pretended that the defendant made any verbal representations to the discount committee, or to any officer of the bank. The only representations claimed or relied upon by the plaintiff are those made by the defendant's husband, John F. Pruyn, and such inferences as may rightfully be drawn from the notes in question, and the checks given by defendant. can be no doubt that the representations made by her husband, John F. Pruyn, at the time of obtaining the money, were sufficient, if binding upon the defendant, to subject her to liability But the trial Court has found as a for the amount of the notes. fact that the husband, was not the agent of the defendant in this particular transaction, and that he was not her general agent, and that he had no authority to make the representations and statements alleged to have been made by him to the discount committee of the plaintiff's bank; "nor were any of the representations as to said notes mentioned in the complaint, or the avails thereof, or the use or application to be made of the same, or of the avails thereof, made by her, or by her husband as her agent."

There remains to be considered, therefore, only the effect of the notes and of the checks, which were in her handwriting, as representations made by the defendant to the bank. A promissory note in the ordinary form, signed by a married woman, payable to the order of her husband and indorsed and presented for discount by him, is not a representation upon its face that the note is made to raise money for her. No implication, pre-

sumption or impression that she was to be benefited by it in her business or estate could be drawn from its form, and from the fact that she had given it to her husband for the purpose of having it discounted. Second National Bank v. Miller, 63 N. Y. 639. To give such a note vitality and effect it must be made to appear, by evidence aliunde the instrument, that it was made in her separate business, or for the benefit of her separate estate.

The fact that she owes a separate estate is not alone sufficient. Broome v. Taylor, 76 N. Y. 564.

The checks drawn by the defendant and upon which the officers of the bank testify that the proceeds of the discount were subsequently paid to the husband do not appear to have been shown to the discount committee, or to any officer of the bank previous to or at the time the notes were discounted. The first check of the defendant for \$500 was dated on the 14th of September, 1876, the date of the original note for the same amount, but it appears from the testimony of Van Hoevenbergh, the cashier of the bank, that this check was not charged until the 18th. the 6th of January, a note of \$800 was discounted, in part renewal of the \$500 note and for \$300, in addition, and "on the 8th of January," testifies the cashier of the bank: "Mrs. Pruyn drew a check on our bank for \$300, and we paid that check out of John F. Pruyn's money." No officer of the bank testifies that he knew of the existence of these checks, or that he was in any way influenced by them in discounting the notes for the defendant's husband. It is not necessary to consider what inference might have been drawn from the checks had they been exhibited to the officers of the bank and relied upon in making the discount. They were not so exhibited, and as a representation made by the defendant, constitute no part of the case, and It follows that the defendant must be eliminated therefrom. was not liable to the bank for the money obtained upon the notes in question.

The judgment of the General Term, affirming the judgment entered on the report of the referee, should be affirmed, with costs.

All concur.

Judgment affirmed.

BANK v. SNIFFEN.

(54 Hun, 894. Supreme Court of New York, 1889.)

Contract of Wife by Promissory Note payable to Order of Husband and discounted by him. — When her separate Estate is bound.

VAN BRUNT, P. J.: The complaint alleges that the defendant, Catherine Sniffen, made her certain promissory notes in 1877 and 1888, in writing, and copies of such notes are set forth therein. Each of said notes was in the same form, but varied in amount. The form was as follows:

"Four months after date I promise to pay to the order of John Sniffen, \$2,500, at the Bowery National Bank, value received.

"Catherine Sniffen."

The plaintiff alleged that the defendant delivered the said notes to the payee, who thereafter, and before maturity, indorsed the said notes and for value delivered the same to the plaintiff. The defendant set up that, at the time of the making and delivery of the said notes to Sniffen, the payee thereof, the defendant was a married woman and the wife of said Sniffen, the payee of said notes, and that the same were made and delivered without consideration. The only evidence offered at the trial were the notes and testimony of the cashier of the defendant, that they were presented for discount by John Sniffen and discounted for him and credit given therefor to him in his account with the bank. And it was admitted that the defendant was a married woman and the wife of John Sniffen. Upon these facts being established, the Court directed verdict for the plaintiff and ordered the exceptions to be heard in the first instance at the General Term. The plaintiff is undoubtedly a bond fide holder of the notes in question, having paid full value therefor But notwithstanding this fact as the law stood to the payee. prior to the enactment of chapter 381 of the laws of 1884, no right of recovery existed.

In the case of the Second National Bank of Watkins v Miller 63 N. Y. 639, it was definitely held that where a married

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woman had made certain notes payable to the order of her husband, which were presented by him for discount to the plaintiff, the notes were nullities, and no implication, presumption or impression that she was to be benefited by them in her business or estate could be drawn from their form, or from the fact that she had given them to her husband for the purpose of having them discounted, but that in order to charge her it must be made to appear by evidence aliunde the instrument that they were, in fact, made in her separate business or for the benefit of her separate estate. This same rule was laid down in the Saratoga County Bank v. Pruyn, 90 N. Y. 250.

The question, then, presented is whether the enactment of chapter 381 of the Laws of 1884 has made any change in the law which will support a recovery upon the part of the plaintiff. The statute is as follows:

"§ 1. A married woman may contract to the same extent, with like effect and in the same form as if unmarried, and she and her separate estate shall be liable thereon, whether such contract relates to her separate business or estate or otherwise, and in no case shall a charge upon her separate estate be necessary."

It is clear that by this section the rules laid down in the cases cited have been abolished, except so far as exceptions arise under the next section, to which attention will be hereafter called; and that it is no longer necessary, in order to hold a married woman upon her contracts, to prove that the obligation was created by her in or about carrying on her trade or business, or that the contract relates to or is made for the benefit of her separate estate, or that the intention to charge her separate is expressed in the instrument by which the liability is created.

The exception, to which attention has been called, is contained in section 2 of the act, which provides that this act shall not apply to any contract that shall be made between husband and wife.

As already stated, unless the obligation which is the subjectmatter of this suit is found to come within the restriction of the section last quoted, the plaintiff has a right to recover. The notes in question were given for value received by the maker, in which case they would have been given for the benefit of her separate estate, and she would be liable upon them, within the

principles laid down in Tiemeyer v. Turnquist, 85 N. Y. 516, or it was a loan of her credit by the wife to the husband. cases already cited show that there is no presumption that the notes were given for value, and, therefore, it must be assumed that they were mere accommodation paper and that they were a loan of her credit by the wife to the husband. If that is the case, then the notes were no contract between the husband and There was no obligation which could be enforced by the wife. husband against the wife under any circumstances. Where two parties execute an instrument without any intention of creating an obligation between them there is no contract. An intention to contract is an essential element of every contract. Therefore, if these were accommodation notes, there was no intention on the part of the maker to contract with the payee, and no intention on the part of either of the parties that any obligation, as between themselves, should be entered into because of the giving of the notes. Although the ordinary rule is that a promissory note is a contract between the maker and the payee yet, if the parties to the instrument intend differently, it is difficult to see how a contract can spring into existence when neither intended that the act done should result in a contract as between them.

It follows from this, then, that the making of this promissory note by the defendant, and the giving of it to her husband, was not the making of any contract between them and was not intended so to be. When, therefore, did the contractual relation spring into existence? Clearly not until the plaintiffs had discounted the paper in question and given the proceeds of such discount to the husband of the defendant. It was then for the first time that a contract did actually spring into existence, and it was not intended by the parties to this paper until that event took place, that any contract because of the making and delivery of the paper should arise. In the loaning of her credit to her husband the wife took this method, and in so doing, as already stated, no contractual relation was formed between the husband and the wife, nor was any contract whatever made between them by reason thereof. It would not be contended for a moment that if the husband and wife had been joint makers of this paper, payable to their own order and indorsed by them, that any contract within the exception of section 2 of the Act of 1884, would have been entered into. But although the form of the paper is different, yet the substantial liability to the holders of the paper of the husband and wife is the same, each being liable to be pursued for the recovery of the amount agreed to be paid upon the face of the paper.

It may be a question whether it was the intention of the legislature to exempt contracts of this description from the action of the first section of the act of 1884. It may very well be, and probably was, the intention of the legislature to guard the wife against the making of contracts between herself and her husband which might be enforced by him against her separate estate, and that the policy of the law was not to promote traffic between the two except under the same restrictions that had heretofore existed, and that it was contracts of this character to which the exception in the statute was intended to apply, and not to those transactions which were contracts in form between husband and wife, but which could not be enforced until the right of some third party had intervened. That this interpretation of the act of the legislature is in accord with its intention seems to be fortified by their passage in 1887 of the act (chap. 537), which permits husband and wife to convey directly to each other real estate without the intervention of a third person. passage of this act the legislature indicated that it was their policy to allow husband and wife to do directly that which heretofore they had been only enabled to do through the intervention of some third party who really had no interest in the transaction.

It seems to be reasonably clear, that if these notes had been made by the defendant to the order of herself and indorsed by her and given to her husband, and he had had them discounted, that a liability would have arisen; and there could be no question as to its being a contract between husband and wife, and thus within the exception contained in the statute of 1884, and yet, so long as the husband was the holder of the notes, the relation between the husband and wife in respect to the paper was precisely the same and her obligation under the paper to her husband in no manner varied from what it was in the case at bar. Now, if the notes had been made in that form, and had been discounted by the bank for the benefit of the husband, a recovery could be had, and it would not be deemed a contract between husband and wife merely because they could not be

used by the husband for the purpose of having them discounted without his indorsement.

It seems, therefore, that there being no rights whatever conferred upon the husband by reason of the making and delivery of this paper to him, that the notes were not contracts between husband and wife, although, in form, they appeared so to be. The prohibition of the act is against contracts between husband and wife; that is, agreements or instruments made between husband and wife which would be valid contracts under the provisions of the first section. The alleged contract between the husband and wife arising out of the notes in question, being no contract at all, would not be valid even under the broad provisions of the first section of the act in question, and, therefore, the exception contained in the second section can have no appli-No contract, therefore, between the husband and wife cation. springing into existence until the plaintiffs became the holder of the paper, and there being no contract between the husband and wife, the provisions of section 1 of the act became applicable.

We are of opinion, therefore, that the plaintiff was entitled to recover, and that the exceptions of the defendant should be overruled and judgment ordered for the plaintiff upon the verdict.

BRADY and DANIELS, JJ., concurred.

Judgment ordered for the plaintiff upon the verdict.

CATHARINE LONGENDYKE v. PETER R. LONGENDYKE.

(44 Barb. 366. Supreme Court of New York, 1863.)

Wife's Action against Husband for Assault and Battery.

By the Court, Hogeboom, J. It is conceded by counsel that by the rules of the common law husband and wife could not sue each other in a civil action. The only question therefore is whether by statute that right has been conferred. It is claimed that this has been done by laws passed in 1860 and 1862. The law of 1860 (Laws of 1860, ch. 90, § 7), was passed, it is obvious mainly if not exclusively to enlarge and establish the rights

of property in married women which had been conferred by the previous acts of 1848 and 1849. In furtherance of that object, section 7 declares that married women may sue and be sued in all matters relating to their property, which may be their sole and separate property or come to them from any person except their husbands; and may bring actions to recover damages for injuries to their person or character, against any person or body corporate, which damages when so recovered shall be their sole and separate property.

The right to sue her husband in an action of assault and battery may perhaps be covered under the literal language of this section; but I think such was not the meaning and intent of the legislature, and such should not be the construction given to the act, for the following among other reasons:—

- 1. It is contrary not only to the rule of the common law but to the spirit and intent of the married women's acts, the object of which was to add to her property rights as a feme sole, and to distinguish her property from her husband's, and not to confer rights of action upon her, against him.
- 2. It is contrary to the policy of the law, and destructive of that conjugal union and tranquillity, which it has always been the object of the law to guard and protect. This has been carried so far, that although the language of the code and of the law of 1847, p. 630, was, when literally construed, comprehensive enough to allow all persons, with one limited exception, to be witnesses, it was held not to allow husband and wife to be witnesses for or against each other, and such is now held to be the rule applicable to this relation, with certain exceptions. Erwin v. Smaller, 2 Sand. 840; Pillow v. Bushnell, 5 Barb. 156; Hasbrouck v. Vandervoort, 4 Sand. 596; City Bank v. Bangs, 3 Paige, 36; People v. Carpenter, 9 Barb. 580; Marsh v. Potter, 30 id. 506; Babbott v. Thomas, 31 id. 277.
- 3. The effect of giving so broad a construction to the act of 1860 might be to involve the husband and wife in perpetual controversy and litigation, to sow the seeds of perpetual domestic discord and broil, to produce the most discordant and conflicting interest of property between them, and to offer a bounty or temptation to the wife to seek encroachment upon her husband's property, which would not only be at war with domestic peace, but deprive her probably of those testamentary

dispositions by the husband, in her favor, which he would otherwise be likely to make.

- 4. Under the acts of 1848 and 1849, which are quite comprehensive, the courts held that they did not remove the wife's common-law disability to contract, otherwise than as respected her separate property. They therefore held her promissory notes, and executory contracts invalid. Evincing a disposition not to enlarge the acts in question beyond their most plain and obvious scope, nor to remove the disabilities of the common law, to any greater extent than was required by the plain words of the statute. Coon v. Brook, 21 Barb. 546; Dickerman v. Abrahams, Id. 551; Bass v. Bean, 16 How. Pr. Rep. 93; Arnold v. Ringold, Id. 158; Switzer v. Valentine, 4 Duer, 96; Yale v. Dederer, 18 N. Y. Rep. 265. The act of 1860 was doubtless intended to enlarge this right to make bargains and contracts, and sections 2 and 8 of that act would appear to give unqualified power to make bargains and contracts in regard to her property; but if we follow the spirit of the previous decisions, it is very doubtful whether they would be held so far to destroy the unity and identity of husband and wife as to enable her to bargain and sell her property to her husband. I refer to this only by way of illustration, and not as intending to express any positive opinion upon the construction which ought to be given to the latter sections.
- 5. The act of 1862 (Laws of 1862, chap. 172), does not materially differ from the act of 1860, or require a different construction. It repeals some sections of the act of 1860. It confers the power to sue and be sued in somewhat broader terms than the act of 160 (see sec. 7), but not in a manner to lead to the implication that the husband was intended to be permitted to be sued by the wife for injuries to her person and character, as in an action of assault and battery, or slander. On the contrary, section 8, which provides that her bargains or contracts shall not be binding upon her husband, nor his property liable therefor, and section 5, which provides that in actions brought or defended by her, neither the husband or his property shall be liable for the costs thereof, nor the recovery therein, give strong color to the presumption that neither her bargains or contracts or actions, which the law intended to authorize, were bargains, contracts, or actions with her husband.

I think the referee erred in sustaining the action; and if I am right on that point, it is unnecessary to examine the other point, already incidentally considered, — whether the husband and wife were competent witnesses against each other in a civil action between them.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

John E. Perkins v. Christina Perkins.

(62 Barb. 531. Supreme Court of New York, 1872.)

Husband's Action against Wife for services.

P. Potter, J. This is an action at law, brought by a husband against his wife, to recover, in an action of assumpsit, for services claimed to have been performed for the wife.

At common law the husband and wife by marriage became The very being or legal existence of the woman one person. was, by the common law, suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing and protection she performs every act. Black. Com. 442; Littleton, §§ 168, 291; Bright on Husband and Wife, 2. It was in consequence of this unity of person between them that neither the husband nor wife could make a grant or contract the one with the other. Shepard v. Shepard, 7 Johns. Ch. 60; Voorhees and wife v. Presbyterian Church, 17 Barb. 104, 105; White v. Wager, 25 N. Y. 329, per Denio, J.; McQueen on Husband and Wife, 18. By these and numerous other authorities, the husband and wife are one person. condition of unity, a husband and wife could no more contract with each other than one individual could contract with himself; the act would be a nullity. Modern statutes in this country, however, have wrought some changes in this relationship. incapacity of a wife to make contracts has, to some extent, been removed by these statutes. Except to the extent that this incapacity has been removed by statute, the marriage relation, in its oneness of unity, remains, unchanged, as it was at common

law, before those statutes were enacted. The new powers conferred on married women, by these statutes, were in derogation of common law, and are to be strictly construed. Coke's Inst. 97, b; Graham v. Van Wyck, 14 Barb. 531, 532; 4 Sandf. 236. These modern statutes relate only to the control and management by married women of their sole and separate estate. to that, the wife is to be deemed a feme sole. The husband has had no new powers conferred upon him, nor has he been released from any of the duties and obligations imposed upon him. condition in this marriage relation is unchanged, so far as regards its unity. The wife is released from no part of this unity, except in so far as it is expressed in these statutes. White v. Wager, 25 N. Y. 333, Denio, J., speaking of these statutes, says: "No doubt there was an intention to confer on the wife the legal capacity of a feme. sole in respect to the conveyance of her property, but this does not prove that she can convey to her husband." Then he proceeds to show that as femes sole have no husbands, the implication is against the power to convey to a husband.

These statutes, being in derogation of the common law, are to be construed with reference to the common law as it existed when they were passed. Dwarris says: "It is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required. The law rather infers, that the act did not intend to make any alteration other than what is specified and besides what has been pronounced; for if they had that design, they would naturally have expressed it." And Chancellor Kent says: "This has been the language of courts in every age," repeating the language of Dwarris, that "it is not to be presumed that the legislature intended to make any innovation upon the common law further than the case absolutely requires." 1 Com. 464. instances are repeated in our books of reports, holding this construction to be sound. It would be contrary to the public policy of the law that there should be a divorce from that conjugal union and mutual confidence demanded by the marital There has been no expression, either in the titles or enacting clauses of the statutes for the protection of married women, or their property and estates, in their letter or spirit, of an intent to destroy the unity or identity of husband and wife,

or which demands or authorizes any such construction as that they may sue or be sued, at law, by each other. It would be monstrous; it would open a door to intolerable controversy and litigation, and sow the seeds of perpetual domestic discord and broil. Longendyke v. Longendyke, 44 Barb. 369. It would convert the holy institution and honored relation of marriage into a nursery to cultivate the worst passions and infirmities of humanity. Surely no such downward progress was intended by the legislature, in this day of advancement in civilization,— of our natural progress in knowledge and intelligence, and of our advanced social and political condition.

The spirit and intent of all the statutes enacted to protect married women in their estates, and to give them in that particular, the powers of femes sole, are limited, in their construction, to the exercise of that power. Though very full powers in that regard are conferred, as they should be, in order to their proper enjoyment, yet all these statutes, being in pari materia, are to be construed together as one, in their letter, spirit, and intent, precisely as if they were all contained in one act.

The statutes of 1848 and 1849, on their face, and in their letter, recognize the disqualification of husbands and wives to contract with each other, in the right to take and receive estates from any person other than the husband. Why except him, but to prevent the construction that the common law was intended to be abrogated? These statutes are the beginning, and they continue to be a part, of a new system and policy, in relation to the separate estates of married women. What part of the common law, then, is abrogated, except that which the statutes express? Has any jurist — has any lawyer — supposed that a husband is not now bound to support, provide for, and maintain his wife? That from the obligations and duties which the marriage contract imposes he has been discharged by these new statutes? That his power to command, and her duty to obey all reasonable commands, has been severed and abrogated? Do they confer upon her the option to say he shall not enjoy his marital rights, and to select her own chosen substitute to exercise them? Do they, in fact, amount to a practical divorce? Better, far, for the permanance of the blessings of the marriage relation; better far for the peace of the society, the union and tranquillity of family relations; that the divorce should be total

at the option of the parties, than that there should be a partial one created by an undefined line to be guessed at by loose interpretation; thus leaving domestic bickerings to afflict, if not overwhelm, the courts; and allowing the parties to a marriage contract to sue each other for every fireside controversy.

Did any one ever suppose that the possession of some separate estate by the wife released the husband, in any degree, from the common-law liability and duty to support and maintain his wife? If he refuses or neglects to furnish such support, may not the tradesman or mechanic sue the husband for necessaries furnished for her support? Would it be a good defence to an action for such legal liability, for the husband to plead that the wife had a separate estate? Is the common law changed, in this respect, because the husband abandons or lives separate from her? If the tradesman sues for necessaries furnished to the support of the wife, is the common law changed, that requires him to prove that the husband has omitted to furnish them? Could the tradesman sue the wife, upon such an account, because the husband refused to pay it? If the husband sues for such necessaries furnished, whom would he sue? What law has given him a better right than a stranger? Must be not sue the same person — sue himself — and prove his own omission to furnish the necessaries? Why can he not do this? Because of that legal unity which no statute has dissolved. If he may sue her for his services, as a legal right, in a court of law, why may he not sue her for damages for withholding any marital right? Where then are the parties to stop? What a vast new field will be thus opened to litigation! Little did sober legislators conceive of the result of these new creations by construction, when they were engaged in making a protective statute, to secure the estates of married women. Barely to state these results and consequences is in effect to give reasonable and practical interpretation to the meaning and intent of the statutes in question.

But at common law, before the passage of these statutes, though husband and wife were held to be but one person, in law, still that person was represented by the husband, in all courts and places, except in equity, where the separate rights of the wife could be sued for, defended, and protected. In all other respects her legal existence was suspended; she was not known. The recent statutes, made in her behalf, not his, have, to the extent expressed therein, enfranchised her, as to those rights, and as to those only. They have extended no powers, they have conferred no new rights upon the husband. If when her separate estate is affected, she can sue, and sue alone, by them she is allowed even to sue her husband, if he interferes with it to her disadvantage. They have not—certainly not in express terms—conferred the corresponding right on him to sue her. They were passed for her protection, not his. She has just such power as the statute expressly confers on her, no more. Nor has he any more. They have conferred none on him. They have released nothing to him.

In White v. Wager, Denio, J., says, page 332: "It is quite apparent from the provisions of [these] acts that the design was not to confer any additional advantage upon married men, but it was intended solely for the benefit of the other party to the marriage relation."

The statute of 1862 (chapter 172, § 3) does, in fact, confer upon a married woman the power, in general terms, to sue and be sued in all matters having relation to her sole and separate property; and also to recover damages for injuries to her person (which damages, before, belonged to her husband). This is a conference, or rather a restoration, of marital rights upon her, not on him; and if it includes the right to sue him, for interference with her separate estate, it does not, in terms, confer on him any right to sue her. But even as to her right to sue him, in an action at law, it has been adjudged to the contrary, since the passage of that act, in two general term cases. Gould v. Gould, 29 How. Pr. 441; Longendyke v. Longendyke, 44 Barb. 366. These cases received much consideration by able and distinguished jurists, and we feel bound to follow their views.

The "right to sue and be sued" was a right that the husband always possessed, before the statute, and independent of it. A statute conferring such a right on him would add nothing to his power in this regard. But could he, therefore, though possessing such a right, sue his wife? Why not? He had, before, all the power at common law, that she had conferred upon her by statute. Did any one ever suppose that under this power he could sue his wife, in an action at law, upon a contract made between them? Does the conferring, by law, an equal power

upon the wife, increase his powers? If the unity of the relation is so severed by this act that he can sue her for his labor, may she not sue him for hers? May she not sue him for the labor and care of nursing and taking care of his children? Nay, may she not sue him even for the labor of bearing them? To what do not these several rights to sue extend? Where is the jurist that dares to draw the line, to say how much of the disability is removed, and how much remains; or to declare that no line of limitation exists?

Until the highest court of review shall otherwise determine, I shall feel bound to hold that the unity of person created by the marriage contract between husband and wife, has been no further severed than the statutes, in express terms, or by necessary implication, have effected that purpose; that the duty of the husband is, now as ever, to labor and provide support for his wife, and that it has not been changed by those statutes; that those statutes have not conferred the right upon husband and wife to make contracts between themselves to that end; but on the contrary, the legislature, in the last of these statutes (Laws of 1867, ch. 887), recognize the unity of the persons and relations of husband and wife, in expressly reserving, and exempting them from communicating or disclosing, even as witnesses, any confidential communications made by one to the other during their marriage. The legislature, it is very clear, then, regarded the sacredness and unity of the relation, not as dissolved, but as existing, to some extent. If we are right in this view, the justice erred in nonsuiting the plaintiff as demanded.

I am not unaware that there are various cases holding that married women having separate estates may employ their husbands as agents to assist in managing them; but this is quite a different thing from the holding that the husband may bring an action against his wife, at law, for his services. This agency may be the best way in which he may labor to support his wife, or aid in doing so. She ought not to be deprived of this aid in managing her estate. This power to make contracts existed at common law; but it was as agent, not as an independent and separate individual. The wife might be the agent of the husband, and in that character make contracts which would bind him; and such agency need not even be expressed, but was implied from a variety of circumstances. This is in aid of the

purposes and comfort of married and domestic life. So, now, the husband may be the agent of the wife in regard to her separate estate. And the term contract, between them, means just this—a contract of agency. So reading some of the obiter remarks found in the reports, giving the word contract, as between husband and wife, this limited meaning, it is well enough; beyond this, it is calculated to mislead.

Nor am I unaware of the obiter remark, made in the case of Fairbanks v. Mothersell, reported in 60 Barbour, 407, as follows: "I suppose, as the law now is in regard to the separate property of married women, they may make special contracts with their husbands, and let jobs to them of particular work, such as building and the like, the same as though they were strangers." From what we see of this reported case, this remark was not at all necessary to the decision. It was not a question between husband and wife, or whether one could enforce, at law, such a contract against the other. It was a mere question of agency, so far as we can judge. The wife, in that case, had given the husband the job of digging a cellar, and laying the cellar wall, upon her separate property, as distinguished from the other part of the building. She agreed to pay him \$138 therefor, and did pay him; but could be have enforced the contract, at law? The husband employed the plaintiff to assist; the plaintiff supposing, at the time, that the husband was the owner.

Afterwards, finding out to the contrary, and that the benefit and advantage was to the wife, he sued the wife, treating the husband as her agent: and so the jury found the fact to be This was right. The jury correctly found, in the justice's court. The judgment was rightly affirmed on this ground, in the county court, and by the Supreme Court. But I do not see how the question arises in the case, that establishes the right of a husband to sue his wife, at law. That question did not arise. The court does, indeed, remark, as I have said, obiter, that they suppose women may make contracts with their husbands. concur in this, if the appointment to an agency, in such case, can be called a special contract. I do not believe it is a legal binding contract, existing between husband and wife. the point we have been considering was not in that case, it is, perhaps, a little unfortunate that the first marginal note of the reporter should be based upon an obiter remark. The case does

not sustain this note. I should greatly hesitate to question the direct adjudication, of that learned and able court; but they did not decide the question. It was not there to be decided.

But if we were even to look at this case upon the merits, conceding the right of the husband to sue, the case is without merit. An implied contract could never exist at law, between a husband and his wife, whom he was bound to support, for services done for her. The implication is the other way. The fact that they had previously lived separate, by turns, proves nothing but a condonation when they again came together. If an express contract was proved, according to the plaintiff's own testimony it was not only to be for a year, but was conditioned that he should not drink whiskey. I think his own testimony showed that there was no performance on his part, but on the contrary he proved a breach; and he should have been nonsuited. But I do not put much stress upon this review on the merits.

Since preparing the foregoing opinion, two cases have appeared, reported in 4 Lansing's Reports, namely, Adams v. Curtis, p. 164, and Minier v. Minier, p. 421, which are supposed to be in conflict with the views above expressed. They are not so, in the material point. In Adams v. Curtis, the case was correctly decided, upon what appeared in it. That was an action by a wife against a copartnership, of which her husband was a member. The husband did not appear in the case, and his copartner did not appear for him. It does not appear what were the pleadings, nor what the issue tried. It only appears that the testimony showed that the plaintiff was the wife of the copartner, Adams, and that she performed the work for the firm for which the action was brought. She was beaten, in the justice's court; she appealed, and the county court reversed the judgment; for what reason, does not appear. In the Supreme Court, the judgment of the county court was affirmed, and the law was there discussed as to the right of a wife to sue her hus-The leading opinion, by MILLER, J., merely holds that such a contract could be made, and if made, could be maintained under the statute of 1862, at law. One member of the court, Hogeboom, J., puts his assent to the decision on the ground that, the husband not having appeared in the case, nor any one for him, there was no one to object to his being sued, or to a judgment against him; and that even if he could not be

sued, his copartner, Curtis, was bound, at all events, and he could seek contribution over from the husband. On either of these propositions, the case is not in conflict with the views we have expressed above, that the statutes were passed to enfranchise married women, and to protect their property, and not to protect, or extend rights to, their husbands.

The case of Minier v. Minier (supra), is to the same effect, that a married woman may maintain an action against her husband to recover moneys intrusted to him by the wife, or for lands which had been purchased with such moneys, and title taken in his name. Such has always been the law of equity, and the modern statutes have but extended it to actions at law. The only criticism to which this last cited case is subject, is the obiter remark of the learned judge that the act of 1862 "warrants the bringing of a suit, both by a wife against her husband, and by a husband against his wife." This last branch of the sentence was not a question before the court, and I cannot give it my assent. It is in conflict with direct holdings in previous cases in the higher court; to wit, in White v. Wager, 25 N. Y. 328, and in Hunt v. Johnson, 44 id. 27. In this last case the court drew the distinction between an instrument made by a wife to her husband, and one from a husband to the wife, even at common law. Referring to another case, Hunt, J., says: "That case differs from the present action; that was a conveyance by wife to the husband; this was by the husband to the wife." They do not necessarily stand upon the same basis, in equity. It is the duty of the husband to provide an assured and comfortable support for the wife during his life, and after his death. No duty rests upon the wife to provide for the husband. The custom of the country, and the laws of the land, look upon her as the party to be aided and sustained by the toil and wealth of the husband. An application of the husband's property for her comfort is eminently equitable, and has been favored by the courts from their earliest existence. No judge has yet announced that this equity, or this favor, is to be extended to gifts from the wife There is, in the nature of things, a broad and to the husband. palpable distinction against an equitable claim in the husband's favor.

Interpreting these statutes (including that of 1862), to be in pari materia, as if all were contained in one act, beginning with

those of 1848 and 1849, entitled "for the more effectual protection of the property of married women;" taking the common law as it has ever been declared; abrogating none of the common law by forced construction, not expressed by a statute; and giving due force to the maxim Expressio unius est exclusio alterius, husbands are excluded from their provisions. The statutes of the State of Pennsylvania (Laws of Session, 1848, p. 536, &c.), which are almost identical with our own, have been so construed in their highest courts. In the case of Diver a Diver, reported in 56 Penn., at page 109, STRONG, J. (now of the United States Supreme Court) said: "The design of this statute (1848) was single. It was not to destroy the oneness of husband and wife, but to protect the wife's property. effectuate this object she is enabled to own, and use and enjoy, her property, by removing it from under the dominion of her husband." "It is to be, as her separate property is enjoyed; as property settled to her separate use. The act no more destroys her union with her husband than does a settlement for her separate use." "It is a remedial statute, and we must construe it so as to suppress the mischief against which it was aimed, but not as altering the common law any further than is necessary to remove the mischief."

There is, then, no doubt as to what the common law was, and It is equally as clear that there is no expression of an intent, in this statute, to destroy the unity or oneness of husband and wife, except as to her, in the single particular of her control of her separate estate. There is no question that statutes are to be interpreted as not changing the common law, unless it is so expressed in terms, or by necessary implication. nothing in the act of 1862, or in its title, that intimates an intent to add new rights or remedies, in favor of a husband. Looking, then, at the common law as still being in force, except as expressly changed by these statutes, let us see what are the expressions in the act of 1862, from which it is attempted to imply a power of destruction of the unity of the parties, husband and wife, further than is expressed. § 7. "She may sue and be sued, in all matters having relation to her sole and separate property." But by whom may she be sued? By herself? Of By him who is in oneness or unity with her? course not. he, the one half of this united one, sue the other half, by virtue of this statute? He certainly could not sue, by the common law. What language then is found in this statute, that authorizes him to sue her? It is a universal canon of construction of statutes that unless the provisions of a new statute are so repugnant to the common law that both cannot exist together, the common law is not abrogated, but remains in all its force. Dwarris, Am. ed., 185, and notes. This is the law of interpre-True, the language of the statute of 1862, that "she may sue and be sued," is broad enough, in general terms, to include all parties that are several and equal, and under no disability; but it does not include persons that are under disability. The husband is, under the common-law disability, unable to sue This statute is not broad enough, and does not dihis wife. vorce him from that disability; whatever it may do for her. It is not broad enough to absolve him from the liability, as well as the duty, to labor for the support and maintenance of the wife; far less does it authorize him to sue her for his support. Though in its language it does, in one particular, and in that only, enfranchise her, and confer rights upon married women, for a particular purpose, there is not one expression in it that confers new powers upon bim. The marriage contract, with its liabilities, cannot be so severed by legislative or judicial construction in favor of a husband. He cannot be so released from a binding Besides, such a contract is clearly against pubcivil contract. lic policy. If, indeed, the statute contained an express provision to that effect, it would, I think, be void, on the ground of its being retrospective in its operation upon marriages solemnized before its passage.

I have been the more inclined to meet and resist the construction claimed by the plaintiff, thus earnestly, at this time, because I have seen the disposition manifested in several dicta which are already found in the reports, tending in that direction. I regard such a construction as in effect, judicial legislation; though in none of the cases has the question been necessary to a direct adjudication. It is entering into a new and unexplored region for judicial action. Its explorations are without compass or chart to direct its forward course, or its retreat. The way will be found dark, and full of stumbling-blocks, and with no experienced guide. Until the legislature shall open the way, or light up the path, I am not disposed to enter.

I think, upon the main question I have discussed above, that the judgment of the county court, and that of the justice, should be reversed, with costs.

BALCOM, J., concurred.

MILLER, P. J., concurred in the result, for the reasons stated in a written opinion.

Judgments reversed.

DELIA WRIGHT v. WILLIAM H. WRIGHT.

(54 N. Y. 437. Commission of Appeals of New York, 1873.)

Wife's Action against Husband on Promissory Note given before Marriage.

REYNOLDS, C. The complaint states that on the 1st of March, 1868, the plaintiff's name was Delia Estabrook, and that about that day the defendant, for a valuable consideration, gave her a promissory note, dated March 1st, 1868, for \$5,000 payable six months after date, with interest; that the plaintiff is the owner and holder of the note; that it is unpaid, and judgment is demanded for the amount with interest. The answer of the defendant denies every allegation of the complaint, except that on the 1st of March, 1868, the plaintiff's name was Delia Estabrook, and upon this issue the parties went to trial before a referee, who found that at the date named the name of the plaintiff was as admitted; that the note was for a valuable consideration given by the defendant; that it was unpaid,—and ordered judgment for the plaintiff for the amount, with interest and costs, and we are to consider the case upon an appeal by the defendant, the judgment of the referee having been affirmed at a General Term of the Supreme Court.

Ordinarily, I think, in a case presented as this is, we might, under well-settled rules of practice, refuse to look into the evidence at all, and affirm the judgment upon the ground that it was supported by the facts found by the referee. But this case is exceptional in many respects, and we prefer to consider it in all its aspects, and see what judgment ought to have been given in the court below. The fact that the note was made by the defendant, and upon a good consideration, must be assumed as it is found by the referee,— as to the execution upon conflicting evidence, and as to the consideration there was no conflict of

fact; and in law it was unquestionably valuable. The case, as it appeared on the trial, without any objection as to evidence, under the issue joined, was substantially and in brief this: Prior to the execution of the note, the plaintiff was a widow and the defendant a widower, and both in marriageable condition. The defendant proposed marriage, and the plaintiff declined unless he settled something on her. She had an income which would cease on marriage, and she was not willing to give it up without some pecuniary equivalent. These negotiations ended by the giving of the note in suit, and on the 10th of March, 1868, the parties were married. Not long after, domestic difficulties arose, resulting finally in separation, and, in that condition of things, this action was brought to recover the amount of the Evidence was given on the trial, without objection by either party, of all the circumstances under which the note was given, and those relating to the disputes after the marriage, and also in respect to the separation. It seems to have been the effort of the defendant to show that the plaintiff left him without cause, and that the consideration of the note had failed; but the finding of the referee disposes of that question. dence upon most points, as well as on this, was conflicting, and we must assume that the referee regarded the defence as a total The only exceptions taken were to the refusal of the referee to nonsuit the plaintiff. This motion was made at the close of the plaintiff's case, upon the ground of want of consideration to the note; that the action was improperly brought for the reason that the note was lost at the time the action was brought; and that a bond of indemnity should have been offered, given or tendered; and "that, the plaintiff being the wife of defendant, she cannot maintain this action."

The consideration of the note was a promise to marry the defendant, which the plaintiff performed. This was unquestionably a good consideration. Sugden, 437; 2 Bl. Com., 297; Verplank v. Sterry, 12 Johns. 536; s. c. 1 Johns. Ch. 261. It was not obnoxious to the statute of frauds, as it was in writing, subscribed by the party to be charged, and was made in consideration of marriage. 2 R. S. 135, § 2. It cannot, I think, be doubted that a promiseory note given in consideration of such a promise, which promise is afterward performed, answers all the objects for which the statute was enacted.

The objection that no bond or indemnity was given or tendered cannot prevail. This is only necessary in ease the lost note was negotiable. 2 R. S. 406, §§ 75, 76. The only copy of the note given in evidence in this case shows that it was not negotiable. But if it be assumed that there was no proof on that subject, one way or the other, we cannot properly presume that the lost note was negotiable in order to give point to a technical objection, and more especially in a case like the present, where the evidence tended very strongly to show that the defendant obtained possession of the note after marriage, without the wife's consent, and either destroyed it or had it in his possession at the time of the trial. Blade v. Noland, 12 Wend. 173; Des Arts v. Leggett, 16 N. Y. 582.

The next and last objection, and the one chiefly argued, is that the plaintiff, being the wife of the defendant, cannot main-It is to be doubted whether, under any rule of tain the action. practice, this form of objection raises any question which ought to be considered in an appellate Court. It certainly does not suggest the question that has been argued before us, that is, that the action is one at law, when it should have been in equity. It may be said, in the first place, that the objection raised does not suggest any infirmity in the plaintiff's right, but rather of remedy or a disability to bring present suit. In such cases, ordinarily, the defence of disability is regarded as dilatory merely, and must, to be made available, be strictly pleaded. In this case no plea of disability on account of the connection of the plaintiff is set up in the answer, and the point might, for that reason, be disregarded. Webster v. Webster, 58 Maine, 139; 4 Am. R. 258; 39 Vt. 319; Logan v. Hill, 19 Iowa, 491. But we do not propose to place our decision upon any such technical ground. At common law, the note in suit, being valid, would have been extinguished by marriage, and no action could have been maintained upon it. But our statute provides that all contracts "made between persons in contemplation of marriage, shall remain in full force after such marriage takes place." Laws of 1859, chap. 475, § 3. This language is entirely clear, and rescues the note in controversy from the fate to which the common law would have consigned it. Power a Lester, 23 N. Y. 527, 529. The plaintiff, therefore, has a valid obligation against the defendant, which, in some form,

either at law or in equity, or both, she can enforce in the courts. The Supreme Court, in which the action was tried, has "general jurisdiction both in law and equity," and it had jurisdiction of the persons of both parties to this controversy, and could give judgment according to the very right of the case, regardless of form, and, in furtherance of the ends of justice, might amend pleadings, conform pleadings to facts proved, and do various other things tending in the direction above indicated. Code, §§ 175, 176, Wait's edition, and cases cited in notes.

While it is admitted that the rights of the plaintiff could be enforced by suit in equity, yet it is insisted that this, being an action at law, cannot be maintained by a married woman against her husband. It might be asked by what authority the defendant names this an action at law? What additional allegation in the complaint would have enabled the defendant to designate it as a suit in equity? Nothing more could be truly said than that the consideration of the note was a promise to marry, which had been performed, and all this was proved without objection. Certainly the defendant has been deprived of no legal right, and if the form of the pleadings was not agreeable to him, it was very easy to have them made to conform to the facts proved, by a proper application. If the complaint was not full enough to disclose the case in all its features, it was competent for the defendant to spread the facts out in his answer by way of affirmative defence or otherwise, for all that has any bearing upon the rights of the parties grew out of one and the same transaction. While regard is still to be had in the application, of legal or equitable principles, there is not of necessity any difference in the mere form of procedure, so far as the case to be stated in the complaint is concerned. All that is needful is to state the facts sufficient to show that the plaintiff is entitled to the relief demanded, and it is the duty of the court to afford the relief without stopping to speculate upon the name to be given to the These principles have been frequently acted upon by Marquat v. Marquat, 2 Kernan, 336; Emery v. the courts. Pease, 20 N. Y. 64; Corning v. Troy Iron and Nail Factory, 40 id. 207; Corn Exchange Ins. Co. v. Babcock, 42 id. 593. Indeed, if some such result has not been attained by the Code of Procedure, we are still in the labyrinth of legal technicalities in practice and pleadings contrived long ago, and tending to enslave the administration of justice, and from which it has been hoped we had, by legislative aid, secured comparative freedom.

When, as in our system, a single court has jurisdiction both in law and equity, and administers justice in a common form of procedure, the two jurisdictions of necessity become to some extent blended. This must be especially the result where the forms of pleading and proceeding are alike. If, as has been in some of the courts of the United States, the rigid forms of the common law have been preserved on one side of the court, while all the old equity forms have been preserved on the other, the distinction between law and equity is still quite apparent. was said long ago by Sir John Mitford (afterward Lord Redes-DALE) that "the distinction between strict law and equity is never, in any country, a permanent distinction; law and equity are in continual progression, and the former is certainly gaining ground upon the latter. A great part of what is now strict law was formerly considered as equity, and the equitable decisions of this age will unavoidably be ranked under the strict law of the next." Mitf. 428. It would not be profitable to attempt to trace the gradual assimilation of two apparently adverse systems of jurisprudence when brought in actual contact in a single court under a common form of procedure; it is enough to know that, in our courts at the present day, justice may be administered without regard to mere form. Certain forms are needful to be preserved, but they must not obstruct the path to exact justice, and if they do they will be swept away. In the present case, we find no difficulty either in form or substance in giving a judgment according to the intention of the parties, and which both law and equity plainly allow.

Under our present system of policy in respect to the relations of husband and wife, I do not see why a married woman may not sue her husband to enforce any right affecting her separate property, in any form of action (if any distinct forms can be said to exist), in the same manner that she might sue any stranger; and such, I think, is the judgment of the courts. Power v. Lester, 23 N. Y. 527, 530; Dygert v. Reimerschnider, 32 N. Y. 629; Whitney v. Whitney, 49 Barbour, 319.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

M'CRILLIS v. How.

(3 N. H. 348. Superior Court of Judicature of New Hampshire, 1826.)

Liability of Infant on Promissory Note for Necessaries.

Assumpsit upon a note, dated February 21, 1823, for \$21.92, made by the defendant and payable to the plaintiff or order. There was also a count upon an account for medicines and visits, as a physician, amounting to \$21.92.

The cause was submitted to the decision of the Court, upon the following facts. The plaintiff did the services, and furnished the medicines, mentioned in the second count; but at the time, the defendant was an infant under the age of twenty-one years. The services so rendered, and the medicines so delivered, were necessary and proper for the defendant. On the 21st February, 1823, the defendant gave to the plaintiff the note, mentioned in the first count, to balance said account; and the plaintiff did balance the account upon his book, by giving credit for the said note. At the time the said note was given, the defendant was an infant, under the age of tweuty-one years.

W. Sawyer, for the plaintiff.

J. H. Woodman, for the defendant.

By the Court. It has long been settled, that no action can be maintained against an infant, upon a promissory note. The reason assigned is, because, if the note was held to be valid, the infant would, when the note was in the hands of a bond fide indorsee, be precluded from disputing the original debt. Chitt. on Bills, 24; 1 D. & E. 40, Freeman v. Hurst; 3 Caines' Rep. 322, Van Winkle v. Mitcham; 10 Johns. 33, Swazey v. The Adm'r of Vanderheyden; 2 Starkie, 36, Ingledew v. Douglas; Campbell, 552, Williamson v. Watts; Carthew, 160, Williams v. Harrison et al.

The plaintiff then cannot recover upon his first count. But we see no objection to a judgment in his favor, on the second count. A void note, given to balance an account, is no satisfac-

tion. 2 Johns. 455, Markle v. Hatfield; 1 Esp. N. P. R. 5; 6 D. & E. 52, Puckford v. Maxwell; 1 N. H. R. 281; 3 Brod. & Bing. 295; 7 Taunton, 311, Hickling v. Hardy; 4 East, 147.

Judgment for the plaintiff.

MORTIMORE v. WRIGHT.

(6 M. & W. 482. Court of Exchequer, 1840.)

Liability of Father for Necessaries for Infant Son.

DEBT for board and lodging furnished to the infant son of the defendant, and for nursing, attendance, and necessaries supplied to him during sickness, with counts for money paid and on an account stated. Ples, sunquam indebitatus. At the trial before ROLFE, B., at the Middlesex Sittings in Hilary Term, it appeared that the defendant's son, who was between nineteen and twenty years of age, lodged with the plaintiff from May 1837 to September, 1839, when he came of age. For the last six or seven months of that time he was too ill to follow his usual occupation, and was supplied with necessaries and attendance by the plaintiff, without making any payment for them. He had previously earned £1 a week, and had from time to time paid his bills to the plaintiff. No proof was given of any orders from, or request by, the defendant to the plaintiff to supply his son with anything: but the following letter from him to the plaintiff was relied on as an admission of his liability: —

Oxford, August 9, 1839.

Mrs. Mortimore,—I am sorry to hear Joseph is in such a bad state of health. You have written to me for money, but I cannot advance any at this time, being so near harvest that the farmers want all they have to pay their men; but Joseph will come in possession of upwards of £80 on September the 6th, 1839, being twenty-one years old that day, and then he can pay you what he owes you himself.—Yours respectfully,

WILLIAM WRIGHT.

It was contended for the defendant, that there was no evidence to go to the jury of any contract by which the defendant was bound to pay the debts in question, and that the plaintiff ought to be nonsuited. The learned Judge inclined to that opinion, but on the authority of Blackburn v. Mackey, 1 C. & P. 1,1 which was cited for the plaintiff, he declined to nonsuit. The plaintiff's letter, to which the above was an answer, was then put in as a part of the defendant's case:—

GREAT ORMOND YARD, August 6th, 1836.

Sir—I am extremely sorry to be obliged to trouble you in. this manner; but ever since the first night your son Joseph came to London, I have had him lodging in my house: I have acted to him in every respect the same as a mother, and for the last six months he has not been able to pay me one penny, and during his illness I boarded and attended to him; that he now owes me 101. 13s. 9d., and part of it lent money: and I am so much distressed by losing so much by others, that has compelled me to write to you, which Joseph's cousin can vouch for, as he is well acquainted with the parties. Sir, if you will be so kind as to advance me the money, or a part of it, you will certainly do an act of charity, for I am in the greatest want of it. If you can persuade your son to come home, I think he might soon be better, otherwise. I think he will soon go into a decline, for he looks very ill. Sir, if you will please to send me an answer as soon as possible, you will much oblige your humble servant,

ELIZABETH MORTIMORE.

The learned Judge directed the jury, that before they could find for the plaintiff, they must be satisfied that the defendant, by his letter, meant to admit an original liability on his part to pay his son's debts. The jury, however, found for the plaintiff, damages 181. 6s., the learned Judge reserving leave to the defendant to move to enter a nonsuit. In Hilary Term, Knowles obtained a rule accordingly, or for a new trial, against which

Lee and Horry now showed cause.—The letter of the defendant was sufficient evidence of liability to go to the jury, and the learned Judge was right in refusing to nonsuit. The case of

¹ E. C. L. R. vol. 11.

Blackburn v. Mackey, which was cited at the trial, is directly There, a letter written by the father of a young man under twenty-one, who had been supplied with clothes by a tailor, certainly not containing terms any stronger in acknowledgment of a liability than this, was held by Lord TENTERDEN to be evidence for the jury, to say whether it admitted an original liability. The fair inference from the defendant's letter was, that if he had been in funds, he would have paid the plain-[Lord Abinger, C. B.—In the case cited, there was an express promise to pay the first bill if sent.] Although it was clear no contract existed on his part before. [Parke, B.—The words were equivocal; it might be either that he was willing to pay as a favor, or that he made no objection in fact or in law to his liability on the first bill. But further, here the son continued afterwards to board with the plaintiff; and after notice to the father of the son's illness, and that necessaries were being supplied to him, he ought to have directly repudiated any liability, otherwise he is bound to pay for them. Nichole v. Allen, 3 C. & P. 36, which was an action for board and lodging furnished to an illegitimate child of the defendant, it was proved that he knew of her being with the plaintiff, and had formerly allowed £12 a year for her support; and Lord Tenterden there said, "Leaving out of the case all about the allowance, it stands thus: he knows where she is, and allows her to remain there:" and again, "There is not only a moral but a legal obligation on the defendant to maintain his child; he knows where she is, and he expresses no dissent, and does not take her away. There is a legal obligation made out, if it is shown that she is maintained in the plaintiff's house, and he knows it; and it then lies on the defendant to show that she is there against his consent, or that he has refused to maintain her any longer at his expense." [Lord Abinger, C. B. That is only a nisi prius decision, and I cannot assent to any such doctrine.] Law v. Wilkin, 6 Ad. & E. 718,2 1 N. & P. 697, was a decision in banc. There a boy at school had been supplied with clothes by the plaintiff, had taken them home at the holidays, and brought them back to school; and it was held (overruling the opinion of PARKE, J., who had nonsuited at the trial), that these facts were evidence to go to the jury of an implied

authority from the father to furnish the clothes. [Lord Abinger, C. B. If that be so, I am sorry for it: I cannot concur in the decision. Parke, B. But for that decision, I certainly should have thought there was no single fact in that case to show the authority of the father, but only mere conjecture.] Here the defendant's letter raises an inference that the previous payments by the son were payments by the father through the instrumentality of the son.

Then, as to the question of a new trial, the two letters taken together, with the fact of the defendant's allowing his son to remain with the plaintiff, after her request that he would take him home on the ground of his ill health, were sufficient evidence from which the jury might reasonably infer that he authorized his continuing there at his charge.

Knowles, contra, was stopped by the Court.

Lord Abinger, C. B. I am clearly of opinion that there was no evidence for the jury in this case, and that the plaintiff ought to have been nonsuited. The learned Judge was anxious, as judges have always been in modern times, not to withdraw any scintilla of evidence from the jury; but he now agrees with the rest of the Court, that there ought to have been a nonsuit. In the present instance, I am the more desirous to make the rule absolute to that extent, in order that there may be no uncertainty as to the law upon this subject. In point of law, a father who gives no authority, and enters into no contract, is no more liable for goods supplied to his son, than a brother, or an uncle, or a mere stranger would be. From the moral obligation a parent is under to provide for his children, a jury are, not unnaturally, disposed to infer against him an admission of a liability in respect of claims upon his son, on grounds which warrant no such inference in point of law. In the present case, it is not pretended that there is any evidence whatever to charge the defendant, independently of the letter written by him, which is relied on for that purpose: but the interpretation which is sought to be put upon that letter is in no respect warranted by the terms of it. [His Lordship read the letter.] There is nothing whatever in this letter to show any intention to acknowledge a debt due from the writer; on the contrary, the father insists that the son, and not himself, is the debtor, and refers the plaintiff to the son for payment. This is rendered even more

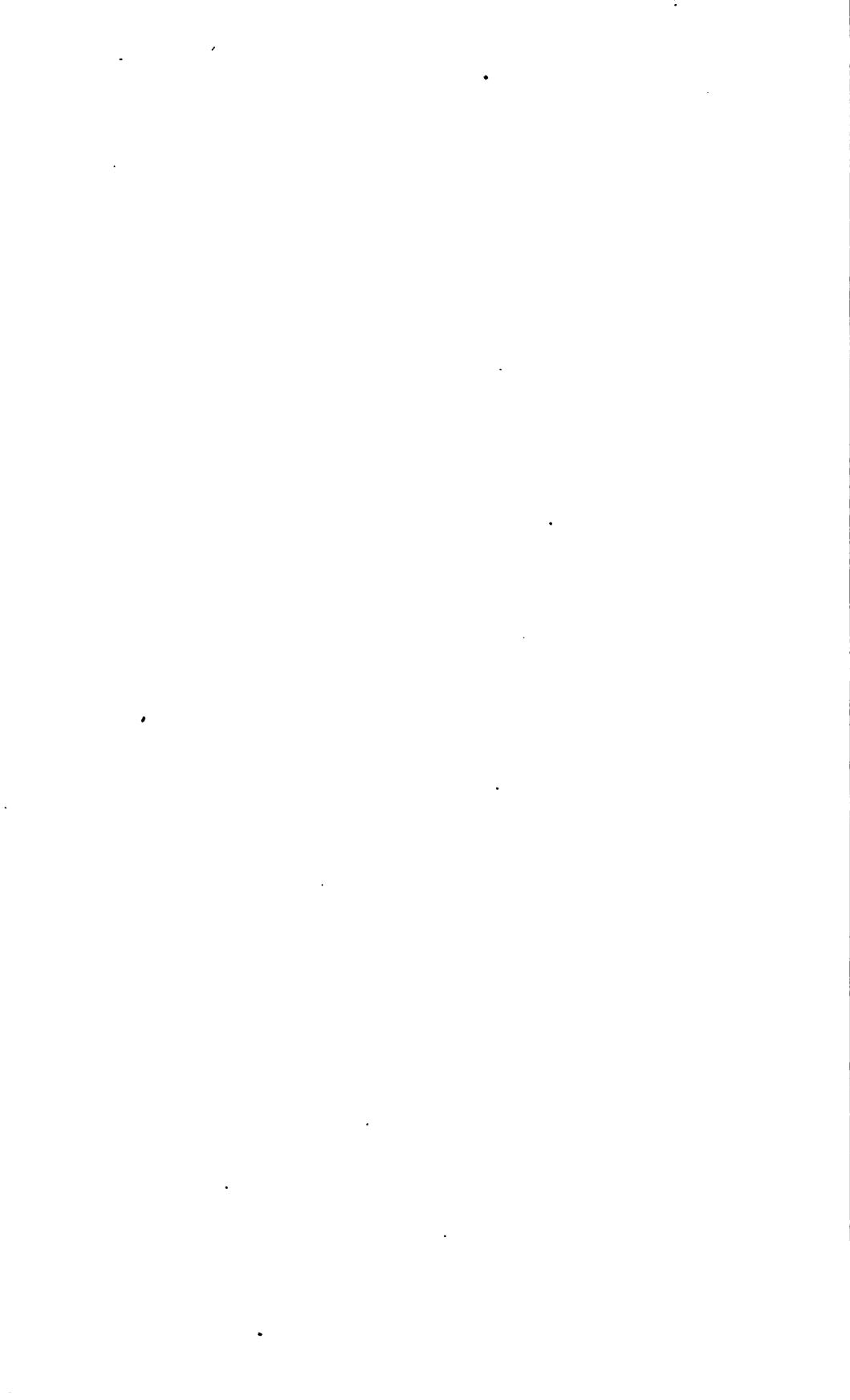
clear by the former letter of the plaintiff, to which the defendant's is an answer; and it is manifest that no admission of any liability whatever was intended, or even expected. gard to the case in the Court of King's Bench, of Law v. Wilkin, if the decision is to be taken as it is reported, I can only say that I am sorry for it, and cannot assent to it. It may have been influenced by facts which do not appear in the report; but as the case stands, it appears to sanction the idea that a father, as regards his liability for debts incurred by his son, is in a different situation from any other relative: which is a doctrine I must altogether dissent from. If a father does any specific act, from which it may reasonably be inferred that he has authorized his son to contract a debt, he may be liable in respect of the debt so contracted: but the mere moral obligation on the father to maintain his child affords no inference of a legal promise to pay his debts; and we ought not to put upon his acts an interpretation which abstractedly, and without reference to that moral obligation, they will not reasonably warrant. to bind a father in point of law for a debt incurred by his son, you must prove that he has contracted to be bound, just in the same manner as you would prove such a contract against any other person; and it would bring the law into great uncertainty, if it were permitted to juries to impose a liability in each particular case, according to their own feelings or prejudices.

PARKE, B. I am of the same opinion, and concur in the observations which have fallen from my Lord Chief Baron; although I should have acted as my Brother Rolfe did at the trial, in declining to nonsuit, from the doubt created by the case of Blackburn v. Mackey, and in the expectation that the jury would find for the defendant, which they undoubtedly ought to have done, after the additional evidence given by him. We are now, however, to decide whether, at the time when that objection was taken by Mr. Knowles at the trial, there was any evidence to go to the jury; and I am of opinion that there was not. It is a clear principle of law, that a father is not under any legal obligation to pay his son's debts; except, indeed, by proceedings under the 43 Eliz., by which he may, under certain circumstances, be compelled to support his children according to his liability; but the mere moral obligation to do so cannot impose upon him any legal liability. Then, did the evidence in this

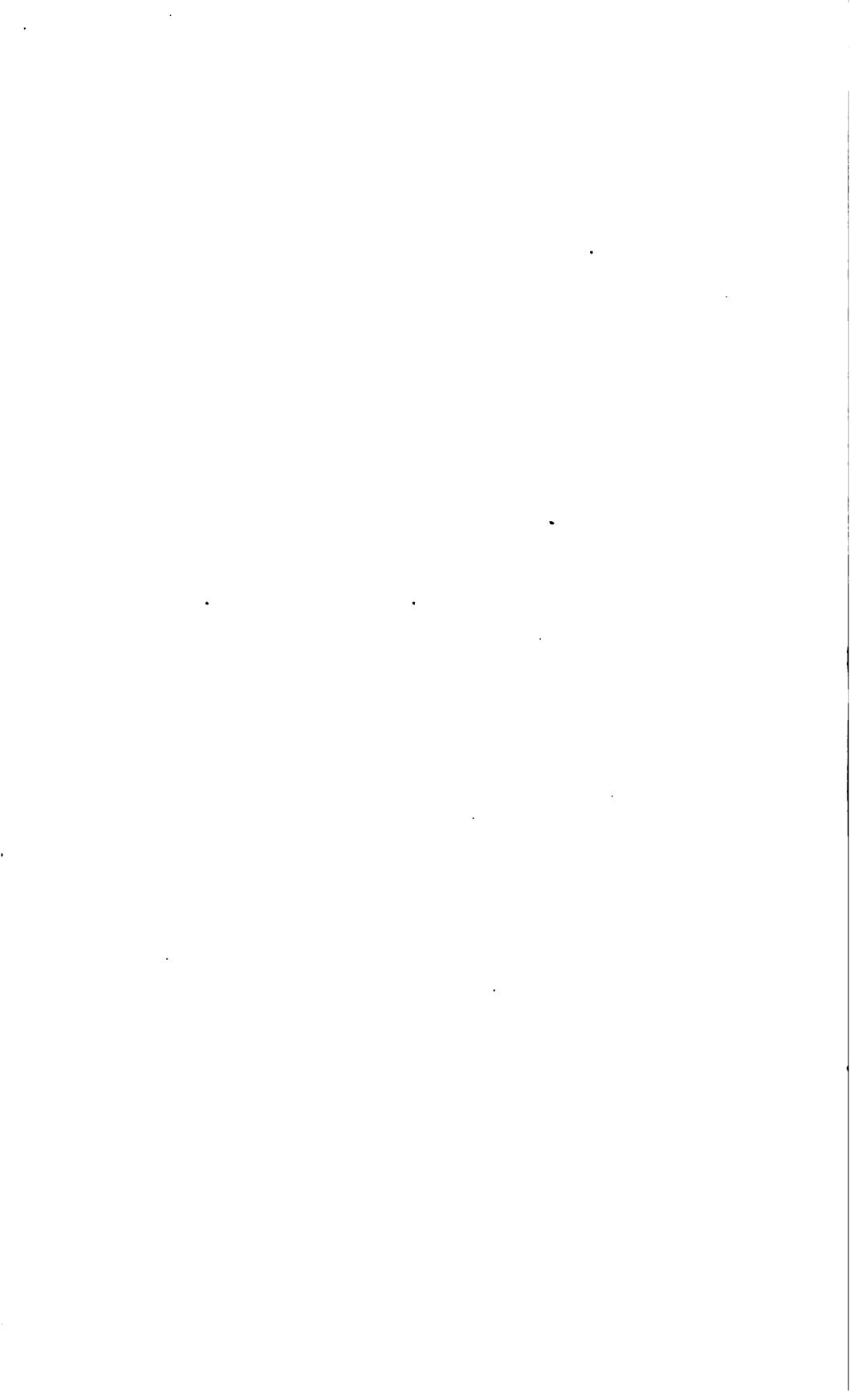
case carry it further? All the facts which were in evidence at the trial were directly opposed to the notion that the defendant had admitted any liability on his part, with the exception of his letter, which as explaining its own purport, was rightly admitted in evidence, without that to which it was an answer. letter is to be read according to the ordinary import of its language; and so reading it, I cannot find in it any admission of liability; it is not even equivocal in its terms, but directly refers to the debt in question as one which the son himself owed; and it is quite consistent with every word of it, that the father was willing to make an advance to the plaintiff by way of gift, if it had been in his power. There was no proof of any contract in this case, which was absolutely necessary to render the defendant liable; and whatever may be the moral obligations of parties, juries must not be allowed to make them contract without legal evidence. The present case is distinguishable from Blackburn v. Mackey, which may possibly be supported, although I doubt much whether, even in that case, there was any evidence for the jury.

ROLFE, B. I am of the same opinion. Had it not been for the case of Blackburn v. Mackey, which was cited at the trial, I should certainly have nonsuited the plaintiff; but, upon reflection, I doubt whether in that case there was any evidence for the jury, and I am clearly of opinion that none was given in this case. After the evidence given for the defendant, the case became still stronger against the plaintiff, and I quite expected a verdict for the defendant.

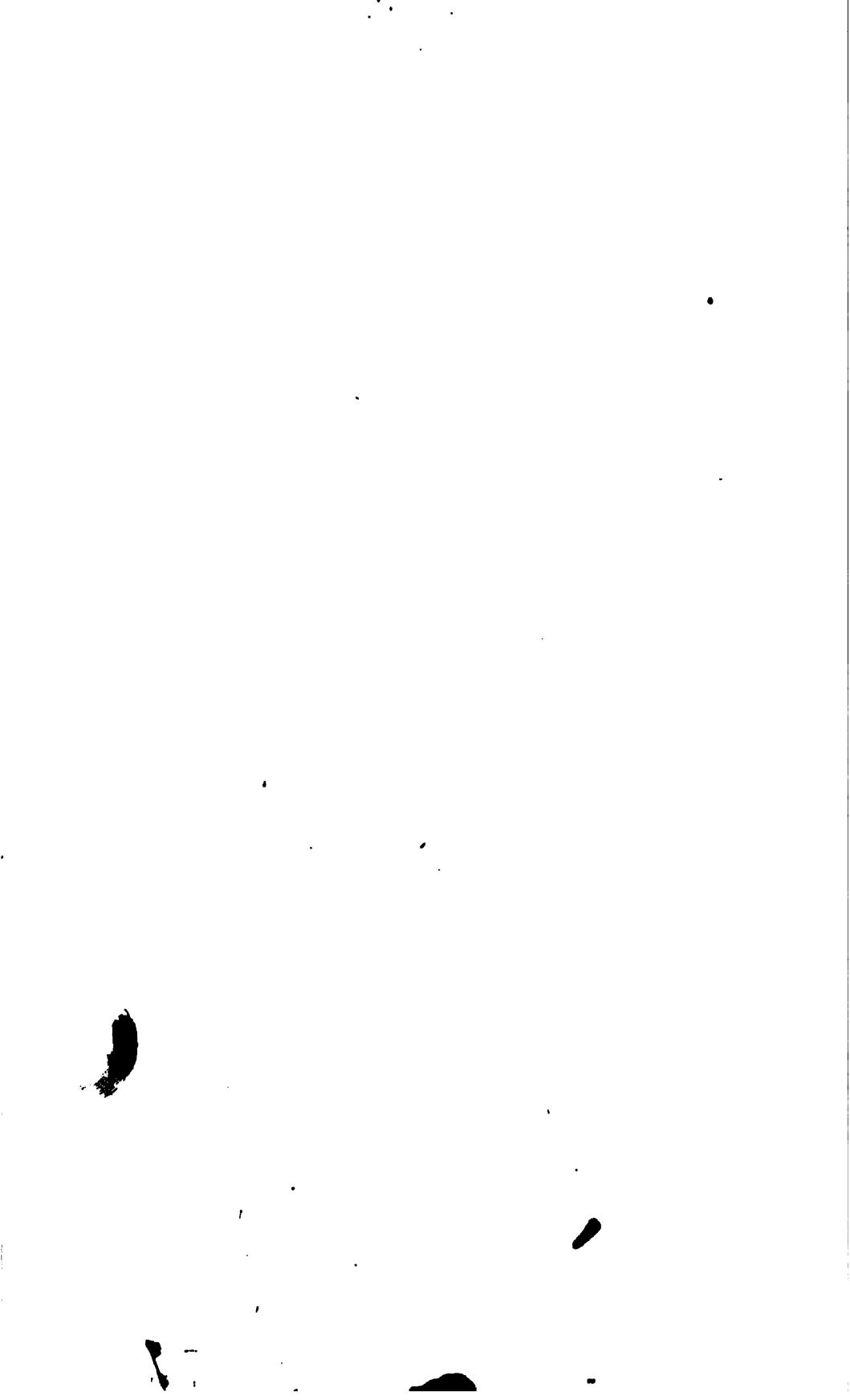
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